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DECISIONS
OF THE
SUDDER DEWANNY ADAWLUT,
RECORDED
IN CONFORMITY WITH ACT XII 1843,
IN
1859.

WITH INDEXES TO NAMES OF PARTIES, AND THE CAUSES OF ACTION AND
PRINCIPAL POINTS TOUCHED UPON IN THE DECISIONS.

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By J. CARRAU.

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1860.

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Held that, as the lower courts have found that petitioner's jote is of a nature rendering him liable to be ousted after judgment obtained, the judgment remaining unsatisfied, and as the judge has found that a balance was due under the summary decree by means of which petitioner was ousted, though the amount of balance found by the judge to be due was not identical with that found to be due by the revenue authorities, that balance is quite sufficient to support the eviction of petitioner. Application rejected ... 1439

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1. When a summons for the attendance of the petitioner, defendant in the suit, was issued under the provisions of Section 24, Act XIX. of 1853, and he concealed himself, so that the summons could not be personally served, and afterwards filed a petition in the lower court, stating that he was aware of the issue of the summons, but could not, without disgracing himself, appear to give evidence in so trifling a matter; held that, under the circumstances, the moonsiff acted properly in disposing of the suit *ex-parte* ... 302

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The costs of both courts, as between plaintiff and Prannath Chowdhree, will be borne by Prannath Chowdhree.

The costs of both courts, as between plaintiff and the other defendants, will, by agreement, be borne by each party respectively. The expense incurred by Government will also be borne by Prannath Chowdhree

6. Case remanded, because, as the provisions of Act XIX. of 1853 concerning default could not apply, petitioner was entitled to a hearing ... 511

7. Under Section 27, Act XIX. of 1853, the courts may receive the amount to which the sale is limited, if tendered on behalf of the absconding witness previous to the sale; but this will not prevent them from issuing further process against him as often as may be necessary ... 653

ACT IX. 1854. ... 1115

See Appeal, No. 5.

ACT VIII. 1859.

1. Petitioner appeals as a pauper, though he did not appear as such below, and his suit is brought close within 12 years from the time of his alleged dispossession.

Held that, as, under Section 367 of Act VIII. of 1859, it is necessary that, previous to admitting a pauper's appeal, the Court should satisfy itself that the claim is not barred by the statute of limitations, the plaintiff should on the record enable the Court to act according to law, which he has not done.

Application rejected ... 1681

2. An application to be allowed to sue as a pauper, considered and decided after the passing of Act VIII. of 1859, must be governed by that law, though the applicant's case may have been pending previously. Act VIII. allows no appeal against an order rejecting such an application ... 1684

3. Held by the majority of the Court, that as the acts complained of were all done before the enactment of Act VIII. of 1859, and the petition complaining of those acts was filed in January 1859, the old law must govern the case ... 1685

4. Wahed Alee, the plaintiff in a suit which was instituted on the 28th June 1859, on the 29th August petitioned that the property in suit might be attached, alleging that when he was preparing to sue and had made ready the draft of his plaint, his father, the defendant, had

discovered his intentions and had sold and given away and also let out in putnee or otherwise certain properties, and that, subsequently to the institution of the suit, he was preparing to alienate more property.

The principal sudder ameen, on a consideration of all the facts in evidence before him, considered it necessary for the preservation of the property that a receiver should be appointed, and acting, it would seem, under Section 92, Act VIII. of 1859, directed the collector of Dacca to take charge of the property as such.

Held by this Court that Sections 83 and 84 of the Act apply only to property other than that in dispute, and to property, either real or personal, which the plaintiff is about to dispose of, or remove with intent to obstruct or delay the execution of the decree; whereas, when property in dispute is in danger of being wasted, damaged, or alienated by the tenant in possession, Section 92 furnishes the only mode of procedure to be adopted by the court, and if danger of the above nature is clearly apparent from the evidence on the record, it is the duty of the court to apply the provisions regarding the appointment of receiver without any consideration as to the nature of the case, or of any reasonable probability that the suit may be eventually successful.

Held also, that in Section 223 the Code of Procedure clearly recognises the doctrine of *lis pendens*, the doctrine, that is, that, subsequent to the institution of a suit, neither party can alienate the property in dispute so as to affect his opponent. Nevertheless, with a view of preventing illegal acts of *vexatious alienation*, the Code, by Section 92, empowers the Court to issue an injunction commanding the parties to refrain from such acts which, though legal, might, in the remedying of them, cause future trouble.

Held, moreover, that in the present case, the acts complained of were all done previously to the institution of the suit. They could, therefore, form no ground for the appointment of a receiver under Section 92, though they might form an element in the court's consideration when determining whether the property in dispute was in danger or not of being wasted or damaged; that the acts complained of in no way injured the property, nor was it shown to the Court's satisfaction that any acts were in contemplation or likely to be done by defendant, which would permanently injure it; but that the conduct of the defendant as in evidence before the Court gave a fair ground for inferring that, if not prevented by injunction, he might vexatiously alienate some of the property in suit.

Order for injunction to be issued accordingly

... 1690

See Actions, Practice, No. 11.

„ Appeal, No. 16.

ACTION, CAUSE OF.

1. A suit was nonsuited by the zillah judge, on the ground that it was not competent to plaintiff, as devisor, to sue to establish her own will in her life-time. But associated with the so-called devisor, were the parties in whose favor her deed was executed, as plaintiffs; and as the declared object of the action was to bring to an issue the power of

- appointment, asserted by the deviser, under the authority of her deceased husband, it was held that the action would lie ... 99
2. A, having voluntarily interposed to stay a sale about to be made in execution of the rights and interests of a judgment debtor in certain property, by paying in the money due by the debtor, has brought this suit to recover the money so paid.
- Held, that the action will not lie ... 402
3. The lower appellate court held this action to be barred by a decision pronounced in an earlier suit relative to the same subject matter; but as the earlier decision nonsuited the plaintiff, the present action is necessarily admissible ... 407
4. In a suit for declaration of a right to be re-admitted to membership of a *dul*, and cost of food provided for an entertainment, which the other members of the *dul* had refused to attend, held, that the latter claim was absurd and could not be entertained, but right to membership considered capable of enforcement, and decreed in accordance with precedents cited ... 535
5. Where a decree was passed in A's favour, but reversed by the Privy Council on their construction of a head of compromise between A and his brother B, as to distribution of the uncle's property, and, subsequently to the first decree, A obtained a second for interest on the principal decreed in the first, and, notwithstanding the Privy Council's order on the appeal, B was unable to obtain review of the second decree, and after a time filed a suit for its reversal, the Court concurred with the lower court, that no new ground of action had been raised, and the suit was barred by Section 16, Regulation III. of 1793; but intimated that the second decree having never been specially appealed, it was open to B to request a review thereof by the *zillah* court ... 596
6. Held, that the present action, *which is one simply for the attachment of surplus proceeds*, to which the plaintiff considers he has an inchoate right, and which he alleges he is apprehensive the mortgagor may appropriate ere he is able to bring his action, for possession of the property mortgaged to him, and for the money in deposit as representing that portion of the property sold for an arrear of rent, is altogether inadmissible in our courts.
- Held that, as the mortgagee's second suit for possession of the mortgaged property, and the surplus proceeds as representing land, is pending, he can, if he thinks fit, and if he has reasonable apprehension that the mortgagor intends to remove the surplus proceeds, move the court under Section 5, Regulation II. of 1806, for the attachment of the same.
- The special appeal decreed, with costs ... 622
7. A defendant must plead all his defence; and cannot found a new suit upon plea not urged in defence in a prior action about the same matter ... 802
8. Plaintiff sued for damages caused by the fraudulent proceedings of the defendant, measuring those damages at the interest upon the principal sum which was eventually decreed to him by the Supreme Court, in a suit for the specific performance of an agreement entered into by the defendant, from the date on which that agreement was repudiated by defendant to the date on which the principal sum was realised by the plaintiff, under the order of the Supreme Court.

Defendant pleaded that this suit is not cognisable in the mofussil courts, inasmuch as, at the time of the institution of this suit, plaintiff was an insolvent, and has, subsequently to the institution of this suit, entered the claim in his schedule, and had obtained his discharge in respect to the present demand, which discharge operates as a bar to this suit. That, moreover, the suit is barred under Section 12, Regulation III. of 1793, as it arises out of the same cause of action with a previous suit between the same parties, which has been dismissed, and as it is a suit for interest of money obtained by him under the decree of the Supreme Court, the suit is not cognisable by the mofussil courts.

The principal sudder ameen gave plaintiff a decree.

Held by the whole Court that, as the defendant has only obtained his *personal discharge*, releasing him from arrest on account of the present demand, and not his *final discharge*, and as the present claim is disputed in defendant's schedule on a point of law, defendant's insolvency is no bar to the present action.

Held by the majority, that the present suit is essentially one for damages on account of loss accruing from the fraudulent conduct of the defendant Joygopal, in which the plaintiff measures his damages at the interest at 12 per cent. per annum accruing on the sum decreed to him by the Supreme Court, from the date on which defendant repudiated his agreement to the date of the realisation, by plaintiff, of the sum agreed to be paid under it, and is therefore clearly admissible. Had the suit been brought as one for interest on an amount decreed to plaintiff, a question might have arisen whether, under the practice of our courts, the suit is admissible.

Held, also, by the majority, that the cause of action in this suit is the fraudulent repudiation by defendant of the agreement entered into by him, and it therefore does not arise out of the same cause of action with the suit previously instituted by plaintiff. That, moreover, the subject matter, *viz.* the damages, which are measured at the interest due on the sum decreed to plaintiff by the Supreme Court, from the date of the repudiation by defendant of his agreement up to the date on which plaintiff realised the amount under the order of that Court, is in no way identical with the subject matter of the previous suits, which were for the surplus proceeds in the hands of the collector, with interest up to the institution of the suit. That, consequently, Section 12, Regulation III. of 1793 is inapplicable to the present suit.

Held also by the majority, that the decision of the lower court should be affirmed, with costs ... 1018

9. Case dismissed, as the point at issue had been previously adjudicated ... 1239

10. Plaintiff brought a suit for money lent under a bond against Khooshnarain Singh, the father of Munoruth Singh, defendant, and obtained a decree. Before the decision passed, however, Khooshnarain Singh had died, and the decree was only against the property of the deceased in the hands of his heir. In execution, Munoruth made objections to the sale of certain properties, and plaintiff now sues to set aside the summary order of the Court, accepting the objections of Munoruth Singh.

Held that, under the foregoing circumstances, there is no ground for holding that the present suit is barred under Section 16, Regula-

tion III. of 1793. The subject matter and the cause of action are not identical with those in that suit, the cause of action in the present suit being the objections made by the defendant in execution to the sale of certain properties in his possession to realise a sum decreed against his father, Khooshnarain Singh.

- Case remanded for re-investigation 1255
10. Plaintiff sued for 79 beegahs, including 25, his claim to which had been disallowed in a previous suit. The first court, after excluding the 25 beegahs, gave him a decree for the remainder. Held, in reversal of the judge's order which dismissed the whole case as barred by Section XVI. Regulation III. of 1793, that there was no reason why the plaintiff's claim to the land in excess of the 25 beegahs, which was within separate boundaries, should not be adjudicated ... 1467
12. Suit for declaration of right in certain plots of ground, on which plaintiff wishes to set up boundary marks, allowed ... 1604
- ACTION, FORM OF.**

1. Plaintiff received a pottah for certain lands from A and sowed them. A dispute arose between A and B for the lands, and the possession was awarded to B under Act IV. of 1840, who reaped the whole crop. Plaintiff sued to recover the value of the crop, but the principal sudder ameen rejected the claim, because plaintiff had not also sued for the reversal of the decision under Act IV. of 1840.

Held that, as plaintiff was no party to that suit, and claimed to recover the value of his crops only as a ryot, and did not assert any proprietary right, it was unnecessary for him to sue to reverse the award under Act IV. of 1840. ... 192

2. Held, that plaintiff, suing for 10½ annas of a property and averring possession of 6½, can only sue for 4 annas ... 294

3. A suit, brought to enforce an instalment bond executed for Rs. 18,460, in adjustment of a debt due for Rs. 42,780, was disposed of by the zillah judge in two distinct forms, that is, by an order of dismissal and by an order of nonsuit.

It was considered, first, that the suit should be dismissed because the same cause of action had been disposed of on its merits on 31st August 1853; but on this appeal, without entertaining the question that might arise as to the identity of the cause of action in both suits, it was held that, as the first suit was nonsuited in this Court, in reversal of the zillah decree of August 1853, this second action was necessarily admissible.

Second, it was considered by the zillah judge that the claim should be nonsuited, because, as the instalment bond provided that, on failure of payment, the full debt should be exigible, plaintiff should have sued upon the old debt and not upon the lesser sum for which the adjustment had been effected; but the Court reserving any opinion as to the competency of plaintiff, who had definitely accepted a lesser sum, to bring an action by way of penalty for the larger debt, was of opinion that, as plaintiff had elected to stand by the compromise and not enforce the penalty, the form of his action did not warrant an order of nonsuit ... 399

4. Held that, in a suit for a portion of a village known by a particular name, it was necessary to state the boundaries of the portion

so claimed, and that the moonsiff's order providing for the determination of the boundaries in execution of the decree was erroneous and liable to lead to further litigation. Order of the judge reversing the decision of the moonsiff and nonsuited the plaintiff, special appellant, confirmed, and special appeal dismissed ... 955

5. Held, that the present suit, being for a declaration of the plaintiff's rights of ownership, should have been brought against the parties who have set up a title adverse to the plaintiff's, and not against the ryots, who, from the nature of their rights, can stand in no such antagonism to plaintiff; and as those parties are not before the court, and the case cannot proceed in their absence, the judge's order of nonsuit is quite correct. Special appeal dismissed, with costs ... 1238

6. Held, on the appeals of a person who had purchased the rights and interests of a party in a particular property, that it is not competent to him in the present suits, which are between the owner of the property of which he has purchased a share, and the farmers of the same, regarding rents, to intervene and ask the court as between himself and his co-sharer, to determine the question of right which he may have acquired by his purchase at the sale.

Appeals rejected, with costs ... 1620

ACTION—NONSUIT.

Where plaintiff was unable to show situation or boundary of the land formerly decreed to him, and for part of which he sued as erroneously awarded by the survey officers to another party, lower court was right in nonsuiting his case ... 589

ACTION, PARTIES TO.

1. Where a putneedar sued ryots upon their kuboolyuts, before a moonsiff, and an intervening purchaser claimed plaintiff's rights as transferred to himself by sale, it was not necessary for plaintiff to make the purchaser a party to his suits for rents; he had but to prove his own possession; no question of title was before lower court; nor could the purchaser, but ryots only, prefer an appeal against the decision ... 201

2. A son having sued and having died during the pendency of the suit, his father, as his son's heir, represented him in the suit. The lower court deemed that, the original plaintiff having been a minor, the suit must be dismissed.

Held, that the defect which precludes minors from suing is that arising from their not having legal liabilities; and that, when plaintiff's father sued as his son's heir this defect was cured ... 485

3. Plaintiff sued as sole owner of the land claimed, and, in consequence of such ownership, he prayed that the wall built by defendant on his exclusive property might be removed.

The first court found that plaintiff's title to the land was not proved, but directed the wall to be removed.

The principal sudder ameen found that plaintiff was only one of many sharers, including the defendant, and that, as the wall was objected to by them, it should be removed.

Held in special appeal, that the decisions of the lower courts do not rest upon the claim put forth by the plaintiff, and that it is not competent, under the practice of our courts, for a person to claim land as

sole owner, and the exercise of a certain right *as such*, and to obtain a decree enabling him to exercise that right in another character, *vis.*, as joint owner; although a claimant to property under a particular title may obtain only a portion of what he claims *under that title*, in which case the difference between the thing claimed and the decree is merely a matter of more or less; that, moreover, the removal of the wall standing on joint property could only be effected in a suit to which all the sharers of the property were parties, a course which has not been taken in the present instance.

Special appeal decreed, with costs, without prejudice to any suit which plaintiff may bring in his character of joint owner of the property ...

1137

4. A borrowed money from B and executed a bond in favor of C, the servant of B. A suit to recover the amount of the bond was brought by B against A and C. The latter acknowledged that he was B's servant, and that the bond had been drawn up in his name for convenience sake, and that the money received by A belonged to B. Held by this Court, in reversal of the order passed by the judge, that as B had made both A and C parties to the suit, and the latter had acknowledged that the money belonged to B, and that he was B's servant, there was no legal objection to the suit, as brought by B ...

1148

5. Appeal rejected. A, a minor's name, was on the bond given to plaintiff, with whom and A's mother B privity was shown. The bond being for benefit of the appellant C, C's privity was also inferrible, and his appeal to be exonerated from sharing with B the consequences of the bond, could not stand ...

1150

6. Where A used B's name in borrowing money and signing a bond, it was no reason to throw out a suit on the bond, that it was brought against A and B, since decree might pass against one, to the exclusion of the other. Remanded ...

1161

7. Where appellant stated he held as lessee of A, plaintiff should have made A's heirs parties to the suit, and lower court could not award mesne profits against appellant ...

1168

8. A case remanded to consider the boundary dispute between defendant and auction purchaser, although it had been settled between defendant and former proprietor ...

1178

9. Plaintiff saved an estate, which he had caused to be sold in execution of decree, but of which the purchase money had not been paid up, from sale for arrears of revenue, by discharging the balance. Held, that, as the execution of his decree was still incomplete, he had such an interest in the estate as entitled him to make the payment, and to claim reimbursement from the owner under Section IX. Act I. of 1845. The purchaser and a person who held a mortgage over the property ought not to have been made defendants in such a suit, as the owner alone is liable under Section IX. ...

1454

10. A stranger allowed to sue for minors when the natural guardians had reasons apparently for not seeking the particular redress asked for ...

1462

11. A suit was instituted to set aside an execution sale of lands, consisting of four kittas or portions; and the first court decided for the plaintiffs, but the zillah judge on appeal nonsuited the case, as the zemindar, who appeared as a third party, and professed to be in possession of one of the four portions, had not been made a defendant in the suit.

Held in special appeal, that the sole issue to be tried in this action was the validity of the execution sale ; that the zemindar could not be required to plead to this issue ; and that his possession of the land, as asserted, could not be prejudiced by a decision made in his absence ... 24

ACTION, THIRD PARTY.

1. Held, that when the pleas of a party, originally an objector, are considered in drawing up the issues, and evidence is produced by him in support of those pleas, the objector has accepted the character of a defendant, and has exercised all the privileges of one : he cannot, therefore, subsequently raise any formal objection grounded on his original position, which, by his own act and acquiescence, has been cured. The plea, therefore, raised in special appeal on this ground, is of no validity, and the special appeal is dismissed, with costs ... 66

2. The objector, appellant, filed his objections below in a suit between two other parties only five days before the judgment was passed.

Held, on appeal by the objector, that his appearance was at too late a date to allow of his objections having any effect on the proceedings at the trial in which other parties were plaintiffs and defendants, that that suit can only affect the rights of parties to it, and consequently cannot prejudice any rights which the appellant may have, or interfere with any proceeding which he may think fit to institute against any parties for the securing of his own rights.

Appeal dismissed, with costs ... 1443

3. Where a party claiming a right to the property in dispute intervened in a suit between other parties, and was made a substantial defendant by the plaintiff and put his claims in issue, it was held that the judge was bound under such circumstances, plaintiff having elected to make him a defendant, to try the issue between him and the plaintiff, and not to refer the party to a separate suit ... 1486

ACTIONS—PRACTICE.

1. In a summary suit for rent, where the name of the defaulting ryot was incorrectly given, but the notices prescribed by law were duly served ; it was held that, in the absence of any fraud, the misnomer was insufficient to vitiate the proceedings before the collector ... 308

2. A principal sudder ameen's refusal to allow time to the defendant, who filed a document and list of witnesses on the day of trial, after the case had been twice postponed, approved ... 483

3. In a suit for reversal of a putnee sale, plaintiffs obtained a commission for the examination of witnesses in the Calcutta Small Cause Court, the time within which it was returnable being fixed with their own concurrence. They neither appeared in that court, however, nor made any attempt to procure the presence of their witnesses. The commission was, consequently, returned unexecuted. Held, that the judge was right, under the circumstances, to decline to re-issue the commission ... 505

4. A sued to reverse a revenue award and to recover possession of certain lands decreed thereby to defendants. While the case was pending, the rights and interests of A in pergunnah Bazeedpore, to which the land in dispute was alleged to belong, were sold at a

sheriff's sale and purchased by the petitioner, who applied to have his name substituted in the place of A. The principal sudder ameen rejected this application and struck off the suit on default.

Held, that there was no objection to petitioner's name being entered jointly with those of the former plaintiffs, as in the decision provision could be made for the due payment of costs and profits ...

564

5. In a case where both parties admitted there was no divided possession of a cutcherie in suit, held, that an issue to try that point was unnecessary.

Where also plaintiff's claim fell short of what defendants admitted to be the value of the items in suit, held, an order for remand for trial of these points was not requisite.

Held, further, that the lower court should not have recorded what would be the result of plaintiff's failing to prove a particular issue, until the final decision of the suit ...

660

6. Plaintiff sued defendants for the value of certain property plundered by them, with interest on the same. The plaintiff filed a list of the articles plundered and their cost with the replication. The principal sudder ameen nonsuited plaintiff.

Held, that though it would have been better, and more in accordance with the terms of the law, had the plaintiff inserted in his plaint the property plundered with its value, still, as he filed the required list with his replication, the principal sudder ameen should have allowed the case to proceed to a hearing on the merits.

Case remanded accordingly ...

868

7. Parties not filing their proofs are to be warned and fined before *ex-parte* judgment can proceed against them ...

1007

8. Appeal rejected. Lower court was correct in deeming defendants' statement of possession in an Act IV. suit no estoppel to their answer in the civil suit under the circumstances ...

1129

9. Held, that when the evidence for the plaintiffs was insufficient to establish their claim, it was unnecessary to look to the evidence produced by the defendants, and that, as the plaintiffs' claim was dismissed, they should be charged with the costs of the defendants ...

1170

10. In a suit for maintenance at a certain rate for a particular period, the judge, in addition to the sum claimed, awarded plaintiff maintenance for the period during which the suit was pending. Held that this part of the judge's order was incorrect, and that he should not have given what plaintiff did not ask for ...

1501

11. Held by the majority of the Court, that a suit must be said to be pending within the meaning of Section 387 of the new Code of Procedure if, when Act VIII. of 1859 came into operation, anything remained to be done which might have been done under the old law; that, in the present case, a petition for review remained to be filed, and as for that purpose three months were allowed by the old law, petitioner, though beyond the 90 days prescribed by the new law in filing his petition of review, still being within three months allowed by the old law, is, under the Section above cited, entitled to ask the Court to proceed according to the old law, inasmuch as the application of the new Code of Procedure will deprive him of a right in reference to the procedure of the case, which, but for the passing of the Code, would have belonged to him ...

1521

12. Where plaintiff sued to recover possession on a mokururee title, and that title was declared to be invalid, it was held that plaintiff was not entitled to recover on the ground of long occupancy ... 1528
13. Plaintiff sued to reverse a kubala propounded by the defendant in an execution case. The principal sudder ameen set aside the kubala, and an appeal was preferred by the defendant. Before the case came on for hearing, the plaintiff and defendant had settled their difference, the former recovering the sum due to him from his original debtor, and withdrawing all objections to the deed of sale held by defendant, and a razeenamah was filed, while at the same time the defendant prayed that, in accordance to his appeal, the decision of the principal sudder ameen, disallowing his deed of sale, might be reversed. The judge however entered into the merits of the case, and, considering the evidence to prove the deed of sale unsatisfactory, confirmed the decision of the lower court. Held, that as the parties had compromised the case, it was unnecessary for the judge to inquire into the validity of the deed of sale, and that he should have set aside the judgment of the lower court on the representation of the parties, so as to render it inoperative between plaintiff and defendant ... 1530
14. Plaintiff sued defendants for possession of certain property and for mutation of names in the public records.
 Defendants objected to the suit in its present form, urging that parties who should have been brought before the court have not been made parties to the suit, and that certain majors have been sued as minors, and minors sued without their guardians as if they had reached their majority.
 The principal sudder ameen nonsuited the plaintiff, with half costs.
 Held by the Court, that the principal sudder ameen should have given the plaintiff an opportunity of correcting the formal errors noted above, and of bringing all the proper parties before the court, and not at once have nonsuited the plaintiff, and that, as the decision of the principal sudder ameen, dated 11th May 1857, reversing the sale under which plaintiff obtained his title has itself been reversed by the judge on the 21st July 1858, no reason exists why the merits of plaintiff's present claim should not be inquired into.
 Case remitted to the principal sudder ameen, with directions to give plaintiff an opportunity of correcting all errors and defects of form apparent on the record, and then to decide the case irrespective of his own decision, which has been reversed. ... 1550
15. Held, that a lower court cannot refuse to receive pleadings during the court hours, if the court be sitting ... 1562

See Act VIII 1850, No. 1.

ADMISSION.

See Evidence.

AGENT AND PRINCIPAL.

Held, that as the son signed the kistbundee in the present case, as the agent of a disclosed principal, his mother, it was competent to the plaintiff to sue the principal alone, but not the principal and agent together.

So much of the judge's decision as makes the son liable on the kistbunde, reversed, and special appeal decreed, with costs ... 619

AGE.

See Minority.

ALIENATION.

See Sales, Private, No. 6.

ALLUVION.

1. Order of lower court upheld. It was proved that the portions of new churs claimed by plaintiff were within the limits of the share held by him in the parent estate, and that, after accretion and before resumption proceedings, the ground was in his occupancy; and the statute of limitations cannot apply to extinguish his right, because of dispossession while those proceedings pended; it could run against him from the date only of their close. The special commissioner's views could bind the civil court on the question only of liability to assessment, not on other rights ...

470

2. A claim to an accretion was advanced by the proprietor of an estate on the southern bank of a river, on the ground that, by usage as well as under Section 2, Regulation XI. 1825, the accretion, having formed on the south of the channel, belonged to his estate; and it was decreed in his favor by the lower court.

But it appearing that the river, changing its course, now flows on the south of its former channel; that there had been no gradual diluvion and reformation; and that the accretion was recognisable as a part of the defendant's estate, the Court held that the case came under Section 5 of the Regulation cited, and accordingly reversed the lower court's decree, with costs ...

1353

3. In a suit for possession of lands of a resumed chur as part of plaintiff's zemindaree, held that it was for plaintiff to prove title, and previous possession was quite insufficient.

Held, also, that where plaintiff claimed a certain portion of land, she must prove her title to that whole area.

Held further, that the chur being on its original formation the property of Government as an island, and the plaintiff being unable to show that the additional accretions did not partake of the character of the original formation, her title could not be admitted.

Held lastly, that the principal sudder ameen was right in the case in refusing further local inquiry prayed for just before judgment was delivered ...

1569

4. Held that, on the pleadings in this case the issues were, 1st, what was the particular share in his father's mokurree tenure to which plaintiff was entitled; and 2nd, has plaintiff a right to share in the lands held by the defendants, as lands which have accreted to their common tenure?

Held also, that in cases in which the liability for rent was joint and common to all the holders of the tenure, however it be occupied or sub-divided amongst themselves, any accretion on the tenure must be subject to the common rights of all, and plaintiff's share in such accretion would be in proportion to his share in the original tenure, and the

zemindar, under Section 4, Regulation XI. of 1825, is bound to settle with all the holders of the tenure for any increment thereon; that plaintiff therefore is entitled to be heard as to whether he is entitled to share in the land leased to the defendants or not, and, if he is, as to the extent of his right to share.

Case remanded for re-investigation

1617

AMEEN.

Summary appeal with regard to non-appointment of a second ameen, rejected

1225

APPEAL.

1. Held that a zillah judge cannot sit in appeal from an order, passed by himself as collector, in a suit under Regulation II. of 1819 ... 22

2. An appeal will lie from an interlocutory order of a zillah judge refusing to receive an answer from a defendant in a pending suit.

An answer is admissible beyond the due period, on cause shown ... 105

3. Case remanded; the lower court having decided the case *ex-parte*, when the respondent, though he had taken the option allowed by law of filing no answer, was yet desirous at the trial to contest appellant's arguments verbally ... 445

4. The plaintiff obtained specific decrees against his co-sharers individually. Only one appealed, on the ground that he had already paid his quota in full. The judge refused to hear the appeal, because the other sharers had not been made respondents.

Held, that this was wrong, as the only question the judge could decide was, whether the appellant was liable for the amount awarded against him or not ... 486

5. Case remanded, for re-trial upon the merits. The lower court could not, on appeal, decide upon a special point ruled by a special law, which the court of first instance had not taken up ... 652

6. As one of the defendants confessed judgment as to her share of the debt sued for, the lower appellate court should not have released her from the decree. Moonsiff's order upheld ... 676

7. In accordance with precedent, proceedings of inquiry about a supposed forgery stayed, pending disposal of an appeal preferred by the accused, against the decree passed ... 691

8. Defendant made no appearance in the first court, and the suit was decided *ex-parte*. On appeal the judge permitted the defendant to file documentary evidence, and disposed of the case on its merits.

Held, that the judge should first have disposed of the plea that no notice of suit was served, for, if it were, defendant could only appeal on the record. If it were not served, the judge, on proof of this fact, should have returned the case to the lower court to allow of the defendant's filing his answer and exhibits. Case remanded to the judge, to follow the course prescribed ... 712

9. Where the plaintiff was satisfied with the amount decreed in his favor, though less than the amount claimed, it was held that the appellate court should not, on appeal of the defendant, have remanded the suit and re-opened the whole case, but have tried the point raised in appeal by defendant ... 929

10. Plaintiff being prepared to proceed with his case when the principal sudder ameen took it up, and there being nothing to show that, although he had not appointed a vakeel, he had not been personally prepared to proceed all along ; held, that the principal sudder ameen ought not to have struck the case off for default, and that the circular order of the 16th June 1854 was not imperative under such circumstances ... 1413
11. Where one of several joint defendants appealed, and it was not alleged that any injury would result to the respondent from the other shareholders not being made co-respondents, it was ruled that the appeal might proceed, the appellant being held to appear on behalf of his co-defendants ... 1450
12. Where the lower appellate court released a defendant who had not appealed, without assigning any reason for so doing, it was held, that such order was erroneous ... 1533
13. Where the judge dismissed an appeal as not filed within time, under the precedent of 3rd June 1855, it was held, that he should have followed the course laid down in the subsequent precedent of 30th November 1857, Yosoof Alee, appellant, and required the appellant to show good and sufficient cause for the delay in filing his appeal. Case remanded ... 1540
14. Where a judge tried an appeal on its merits, and then, when the case was remanded by the Court for disposal of a plea of limitation overlooked by the lower courts, threw out the appeal, on the ground that the petition had not been filed within time, it was held that the defect in filing the appeal must be considered to be remedied by the judge's own act, and that, having once tried the appeal, it must be considered to have been admitted after time for some good and valid reason, and that the judge was not competent to throw it out for the reason assigned ... 1541
15. Held, that a party who has originally presented a petition to be allowed to appeal *beyond time*, which has been rejected, cannot, on the other side appealing, take advantage of Clause 3, Section VII. Act XV. of 1853, and then present a fresh petition of appeal on the same grounds as those stated in his petition, which has been rejected ; but he is barred by Section IX. of that Act from presenting any second appeal at all ... 1553
16. Review of the order of this Court granted, and that order stayed, inasmuch as it appeared that the order appealed against and the petition appealing against it were of date subsequent to the enactment of Act VIII. of 1859, and that it was not competent to the Court under Section 366 to hear the present matter in appeal until all the forms of procedure required by Sections 344, 345, and 346 of Act VIII. of 1859, had been gone through, a course which had not been adopted in the present instance ... 1561
17. Held, that when a party pleads, not only the general issue, but, as is the custom in our courts, particularly, his proofs must be in accordance with the particular statements which he has pleaded, and if his evidence does not support those statements his suit must be dismissed, and under no circumstances can it be allowed to parties before the appellate court to vary their statements, as has been

attempted by both the defendants in this case, so as to meet the evidence which has been given at variance with the original pleadings.

Held also, that the evidence of payment in 1856, offered by Gooroopersad Koonnd, is unsatisfactory. The Court at the hearing of the case decided against the genuineness of the receipt and the deed of release produced by him, an opinion from which it sees no reason now to recede.

Application for review of judgment dismissed, with costs	1621
18. No appeal lies from a zillah judge's order, rejecting application for review of judgment	1683
19. Held, in accordance with a previous ruling of this Court, that no appeal lies from the order of a judge admitting a party to sue as a pauper in consequence of his poverty. Appeal rejected	1684

APPEAL, TIME FOR.

Cases remanded under the precedent of Hubeeboonnissa's case, 10th August 1858, relative to time for filing reasons of appeal in suits decided by moonsiffs

... 109, 190, 191, 269, 392

APPEALS, SPECIAL.

1. Two special appeals dismissed, the one because the facts upon which the pleas taken in special appeal were based were not established, and the other because the land in suit was within the land forming the subject of the former suit

68

2. Held, that Section 2 of Act XLI. of 1858 makes all documents of the nature therein specified, which were executed before its enactment, though informal as the law stood at the time of their execution, hereafter admissible in any court; that Section 3 of the same law enacts that, in cases in which documents of the same nature have been before the courts, and rejected on the ground that they were insufficiently stamped, a review of judgment may be had if the application be made within six months from the passing of the Act, and if the court to which the application is made be satisfied that the deed, if admitted, would have led to a different decision on the merits of the case; and that Section 4 of the Act limits the operation of Section 3 to six years, from the date of final decision of the court which might have looked, or did look, as the case may be, into the merits of the case.

Held, also, that Section 2, as it stands, in no way declares that deeds of the nature alluded to in the Act have been valid, so that judgments correctly passed before the passing of the Act, grounded on their invalidity, are liable to reversal in special appeal.

Held, moreover, that as the decisions passed by the lower courts were correct, those decisions must be upheld in special appeal, and the special appellant must be dismissed, with costs; and it will remain for special appellant to make application to the highest court, which had power to enquire into the merits of his suit, for review of judgment, and the court, in granting or refusing the application, will be governed by the terms of Section 3 of the law above cited

70

3. Special appeal dismissed, as, on reference to the record, it was found that the special appellant had, in the lower court, brought

C

forward no evidence to sustain the allegation on which the special appeal had been admitted	80
4. Special appeal was admitted on the ground of the principal sudder ameen's having misconstrued the terms of the replication. That view was taken from the abstract of the pleadings in the decision, which alone was adduced. But on the original pleading being perused, no misconstruction was found.	
Special appeal dismissed	149
5. Special appeal dismissed, as the point on which it was admitted did not arise, the principal sudder ameen having held that the defendant cultivated the lands for 1258, and that if the plaintiff had cut the crops the defendant's remedy was to sue for damages	153
6. Appeal dismissed, as the point taken when the special appeal was admitted does not arise from the proceedings	189, 1001, 1414, 1424
7. The lower court having decided on the merits that, although both plaintiff's and defendant's deeds were proved, defendant's, as of prior date, should have the preference, and, further, that defendant's possession was proved and plaintiff barred by limitation, special appeal rejected	196
8. Special appeal rejected, the plea in it not having been urged by petitioner when he appealed from the decision of the court of first instance to the lower appellate court, from the judgment of which he now appeals specially	592, 641
9. There not having been any miscarriage in the lower court's proceedings, order confirmed	640
10. The plea in special appeal being that a lower appellate court, not having gone into the validity of a bond, in regard to three of four parties to its judgment, was defective; held that, as the judge had on appeal decreed the deed invalid altogether as an interpolated document, this plea was inadmissible	645
11. The deed of settlement was not specific on the point, whether the land in defendant's possession was part of the land settled for with petitioners. As the lower court had decided the point as a matter of fact, the Court could not interfere. Appeal dismissed	647
12. Appeal dismissed; for plaintiff's payment of revenue in excess of his own share for defendant's benefit, it was in evidence, could not include the kist for the month for which defendant claimed a set-off...	650
13. The lower court having, by mistake, exempted one party who did not appeal, its order was reversed	706
14. The finding of fact by the lower court, that the family, though living together, possessed their land in separate shares, could not be questioned in special appeal, nor was the burden of proof thrown on the wrong party	709
15. Two persons were sued as heirs of a deceased Mahomedan for a bond debt contracted by their ancestor. One of them, Munsoor Alee, was alleged to have executed the deed himself, and received the consideration money, and it was sought to make him personally liable. The principal sudder ameen absolved the defendants from personal liability, but gave a decree against them to the extent of the assets in their hands. One appealed, the other, Munsoor Alee, did not. The judge considered the bond spurious, and absolved both defendants. It was urged in special appeal that the decree should stand against Munsoor	

Alee, as he had admitted the execution of the bond, and had not appealed. The Court found that his statement, with regard to the execution of the bond, was not an admission of the correctness of the plaintiff's allegations, but a totally different story, and confirmed the judge's order. ...	739
16. On the evidence adduced, the lower court held the pottah, to set aside which suit had been laid, to be established, and dismissed the suit. With this order there could be no interference in special appeal ...	754
17. When the question of limitation did not arise, it was unnecessary to prove possession or dispossession, the real point at issue between the parties being the validity of their respective titles ; and as the lower court held the plaintiff's title to be valid, the Court refused to interfere in special appeal with this finding in fact, and dismissed the appeal. ...	828
18. Appeal rejected, as the lower court had found upon the facts that the law of limitation could not apply ...	830
19. Special appeal dismissed, petitioner's statement being erroneous, that the lower court had held him bound to execute a bill of sale, when it had merely given plaintiffs a declaratory title ...	856
20. The objections raised in the certificate, under the circumstances explained by the pleaders, held not to arise ...	942
21. Remanded ; the summary appeal having been filed in time, which was permitted to be converted into a special one. The delay caused thereby was no ground for striking off the appeal ...	958
22. Grounds of appeal after explanation allowed to be amended. Special appeal objected, that the judge had declared his lease spurious without calling upon the plaintiff to prove his title. As the decision of the judge shows that he found the plaintiff's purchase to be proved, the objection taken by special appellant falls to the ground. Appeal dismissed ...	963
23. The judge's reversal of the order of nonsuit and remand for trial on the merits could be no bar to his subsequent dismissal of the suit in appeal upon the point of dispossession, which he had indicated to lower court as the turning point of the case ; and with this finding on fact, there can be no interference in special appeal ...	966
24. A special appeal having been admitted, to try whether the judge should have found the fact of the existence of a mookurree lease when the original was not produced and no documentary evidence adduced as to it, held, that, as the judge had found the above fact on the presumptions and probabilities of the case, this point was not open to special appeal.	
But the Court amended the certificate, to try whether, admitting the facts as found by the judge, they showed a sufficient title to bar the zemindar from re-letting the land.	
Held, that, as the best evidence in defendant's favor was the pottah, and was at the command of defendant, and he did not produce it, the presumption was against his entire plea ...	1048
25. Suit for possession of joint property under Mitakshara law. Appeal rejected ; the points mooted in the certificate of admission not being, under the circumstances, cognisable ...	1144
26. Where there was oral testimony only to the matter of possession, and no title-deed on either side exhibited, it was unnecessary to remand to try question of right ...	1149

27. As the lower court's finding on the time of dispossession was not opposed to the plaint, point in the certificate did not arise ... 1155
28. There could be no interference with the finding of the lower court, which, from a deed of sale of lands by defendant to plaintiff, in return for payments of his rents, inferred that the plaintiff continued to pay them after that sale ... 1158
29. Plaintiff did not raise any issue arising upon the pottah, as assumed in the certificate admitting appeal, but denied the pottah. The point suggested not arising, the lower court's order upheld ... 1173
30. Held, that, as the lower court has found as a fact that the grant was not a conditional one, as pleaded by petitioner, but an unconditional one, and that he was unable to show that any lands held unconditionally within his estate, have ever, by particular custom, lapsed on failure of direct male heirs, the point raised in special appeal, which is one of fact, cannot be raised. The special appeal rejected, with costs ... 1242
31. Appeal rejected, as the pleader admitted that the fact on which the certificate allowed the special appeal application was not such as was stated in the certificate ... 1285
32. Held, that the principal sudder ameen did not misinterpret in his decision a map, so as to represent it as setting forth the reverse of what it did set forth ; but that he considered as a matter of fact that the boundaries of a village extended so as to include the disputed land. Appeal rejected ... 1302
33. Held, where a difference in the amount entered in a sale notification arises only from the difference between Company's and Sicca Rupees, the entry is in reality correct.
Held, that this state of facts should have been mentioned to the Court by the special appellant's pleader, on the application for admission ... 1410
34. Lower court's estimate of evidence cannot be questioned in special appeal. Application rejected ... 1466, 1469
35. Held that, although the lower courts have noticed the absence of stamp on the pottah as one of the grounds for rejecting plaintiff's suit, still they have dismissed it on other and independent grounds.
The special appeal is dismissed, with costs ... 1470
36. As the decision of the lower court met the point raised in the certificate, and declared the kuboolyuts produced by the plaintiff to be spurious, the special appeal was dismissed ... 1479
37. As the objection to the costs was not taken by the appellant as a distinct ground of appeal in the lower appellate court, it was held that a special appeal on this ground could not be entertained ... 1480
38. Order of nonsuit recorded on erroneous grounds reversed ... 1492
39. The finding of the lower court being held to be sufficient, the special appeal is rejected ... 1493
40. Held that the point raised in special appeal was not admissible under the special appeal law ; and as the suit had been decided upon other grounds besides that objected to in the special appeal, this appeal must be dismissed ... 1503
41. A clerical error in a date having been pointed out in the decree below when special appeal was heard, apparent inconsistency thereby cleared up, and appeal rejected ... 1527

42. Special appeal, preferred on the ground that the lower court had misconstrued certain documents and had failed to determine material issues in the cause, rejected, as it did not appear to the majority of the Court that the misconstruction and failure complained of existed 1634
43. The institution of a special appeal will not entitle a party, against whom proceedings have been taken on a charge of forgery, to have those proceedings stayed. The question, whether a document is a forgery or not, is a question of fact, with which this Court cannot interfere in special appeal ... 1681

ARBITRATION.

1. In a case where effect had been given to a *private* award of arbitration, as if it had been one under Regulation XVI. of 1793, it was pleaded that a payment made intermediately was consequently null and void, and could not give a new cause of action.
Held that the payment having been admitted, by not being denied in the answer, and so being an acknowledgment of the sum declared due by the arbitration award, must be taken to give a new cause of action ... 367
2. With reference to a prior precedent, decrees of lower court set aside, and suit remanded. It was apparent that defendant had not authorised his pleader to refer his cause to arbitration, and had objected to that step in an early stage of the subsequent proceedings ... 581
3. Held by the majority, that the silence of a party for four years after attaining majority, does not debar him from questioning an arbitration award, which he pleads to be based on collusive proceedings.
Held also, that Clause 2, Section 3, Regulation VI. of 1813 does not apply to a case like this, of a private reference to arbitration, and not being an award connected with the action of the civil court, either in its origin or execution ... 1237
4. Where arbitrators privately appointed had given their award, and then, on a fresh question relating to the property arising, which they assisted to decide, not in their character of arbitrators, it was held that the judge acted correctly in disposing of the case not according to the award made by them, but according to their evidence which he held to be worthy of credit ... 1657

ASSESSMENT.

See Rent, Assessment of.

ATTACHMENT.

1. Held, that the effect of an attachment under Regulation II. of 1806, *pendente lite*, entitles the decree-holder to a preference on the proceeds of the sale of the property attached, over a party who acquired a mortgage on the same *after* attachment ... 102
2. Order made by the zillah judge under Regulation XXVII. of 1806 being founded on the presumption known from the evidence of plaintiff, that defendant meant to dispose of his property, so as to defeat the eventual judgment, is affirmed ... 103
3. Where there has been a previous attachment under Regulation II. of 1806, a further attachment under VII. of 1825 is unnecessary ... 1453

AUCTION SALES.

1. The sale of an estate for arrears of revenue was set aside by the lower appellate court, on the ground that, as the revenue of the estate was less than rs. 10, and all such estates were, under the rules of the Board of Revenue, to be sold only on the 25th May, this sale, held on the 25th February 1845, was illegal.

But, on special appeal, the decree of the principal sudder ameen is reversed, inasmuch as the rules referred to by that officer were promulgated to have effect under Act I. of 1845, which did not come into operation till the last day of February 1845, while the sale in question occurred on the 25th February, under the provisions of Act XII. of 1841

370

2. Application for review rejected, as the law, Section 12, Regulation XLV. of 1793, under which the sale was held, distinctly required the proclamation of sale to be issued in the property sold, and it was held that a proclamation made in a large bazaar, not within any of the villages advertised for sale, though surrounded by them, was not such a publication as is required by the law.

Held, further, that as the law does not provide for the refund of the purchase money to the auction purchasers, except when the sale is summarily reversed under Regulation VII. of 1825, petitioner must be left to recover it in the ordinary course of law

984

3. When a chur was temporarily settled and sold for arrears of Government revenue, it was held that the auction purchaser was not authorised to eject the defendants' ryots, who were in possession when the settlement, under which the auction purchaser holds, was concluded, but that he is entitled to take possession of lands not actually cultivated by them, but held from them as a subordinate tenure by under-tenants

1456

BENAMEE.

1. Held, that however objectionable the system of benamsee transactions may be in theory, it is legal and in common use. It was consequently incumbent on the judge to recognise it, and to follow those rules in discovering the merits of the particular transactions before him, which have been prescribed by the precedents of the Privy Council and of this Court.

Held, also, that in the present case, in which the plaintiffs, special appellants, filed the original deed of sale, the receipt for the purchase money, and various other documents, and in which they allege that, though the purchase was made in the name of Khadim Alea, the real purchaser was their ancestor, Gholam Ghous, and that Khadim Alea was a mere trustee for Gholam Ghous, in whom rested the beneficial ownership, it was incumbent on plaintiffs to *prove the payment of the purchase money by them*, and if they did so, any subsequent acts done in the name of the nominal owner would be explained by reference to the original transaction; whereas, if they cannot prove that payment, their case must necessarily fail.

Case remitted for re-investigation by the judge, as suggested in the remarks made by the Court

139

2. Held, that, where the defendant putneedar admitted that he had contravened the law by bidding in the name of the plaintiff, at a sale

under Regulation, VIII. 1819, for his own putnee, which was put up for sale for arrears of rent, he could not oppose possession being given to the plaintiff, in whom the legal title was vested, nor call upon him to prove that he was a <i>bond fide</i> and not a benamée purchaser ...	267
3. As plaintiff, even if he had not authorised purchase in the name of another of the estate sold for arrears of revenue under the old sale law, had made use of the transaction as if he had, he was disqualified (under precedents) from maintaining an action for possession, &c. ...	287
4. A suit to establish a title to certain putnees purchased in the name of plaintiff's mother, in which the defendants alleged the benamée trust to have been executed by plaintiff's aunt in the name of his mother, and claimed as her heir, decided on the evidence in favor of plaintiff, the benamée trustee supporting his case, the title-deeds being in his possession, and the probabilities of the case in his favor ...	577
5. A suit remanded to the lower court for inquiry as to the pleas of one defendant, dismissed for want of evidence of title, and because the purchase was benamée, and therefore in contravention of the law in Section 22, Regulation XI. of 1822. On appeal the Court on the same grounds confirmed the decision ...	1331
6. Where the defence, admitting the execution of a deed of sale, pleaded that it had been executed for the purpose of defeating the claims of parties who held decrees against the vendors and was a purely fictitious transaction, and it was contended that the person through whom plaintiff sued was <i>in pari delicto</i> with the defendant, and that the defendant should not therefore be debarred from pleading the fictitious nature of this transaction; held, on the authority of the English cases of <i>Montefiori versus Montefiori</i> and <i>Doe dem. Roberts</i> , that, although a deed may be avoided on the ground of fraud, the objection must come from a person neither party nor privy to it, for no man can allege his own fraud to invalidate his own deed ...	1639

See Evidence, No. 10.

BILLS OF EXCHANGE.

Plaintiff obtained a bill from the defendant on his house in Calcutta. Plaintiff sent this bill by post to his gomashtha, but as it did not reach the addressee he got a duplicate from the defendant. When the duplicate was presented, payment was refused, on the ground that the original bill had in the mean time been presented and the amount paid to Luchmeepersad, a servant of the plaintiff. It was contended in the lower courts that Luchmeepersad was not a servant of the plaintiff, nor authorised to receive the money; and finding this to be the case, the judge confirmed the decree of the first court for the plaintiff. In special appeal it was urged that a hoondée of this kind is payable, like a bank note, to the bearer without any indorsement. When the case came up for trial the special appellant's vakeel pointed out a blank indorsement on the original hoondée, which would exonerate the defendant from any charge of wrong payment, and prayed that the Court would dispose of the case on that ground. As, however, that fact of the blank indorsement is no where advanced by the defendant in his pleadings as justifying the payment to Luchmeepersad, but he contended that he was justified in doing so because he was the servant

of the plaintiff, which was the issue raised and tried in the courts below, it was held that the certificate could not be amended as proposed by the special appellant, and with the master of fact decided below this Court could not interfere. Appeal dismissed. 1477

BOND.

1. In a suit on a bond, the courts are not restricted to proof of execution of the bond only; or of payment of consideration only, nor bound to take proof of both, but to act according to the exigencies of each case. 113

2. The execution of a promissory note was proved, but the rajah defendant refused to appear in court; and could not therefore file proofs in support of his denial: plaintiff's claim and decree upheld. 321

3. The mooktearnamah under which the loan had been obtained was not satisfactorily attested, and there was no evidence to prove that the money ever reached the principal, whose heirs are made defendants in this case: the decision of the lower court reversed. 794

4. The decision of the lower court upheld, as the evidence and probabilities of the case supported it. 865

5. Held, that where a defendant was no party to a bond, he could not be held jointly liable with the parties who executed it for the amount, because, as was alleged by the plaintiff, through his evil advice, the others had failed to make payment. 1485

6. Where certain parties interested agreed to subscribe to carry on a suit which was to be conducted by the plaintiff, one of the parties; the defendant in the present action, being unable to pay his quota in cash, gave a bond for the amount. Plaintiff now sues to recover the amount of the bond. It was held that as plaintiff had not up to the present time instituted the suit, or given any consideration for the bond, he was not entitled to recover, and his special appeal was dismissed. 1491

7. The evidence to prove the execution of the bond, on which the present action was brought, being considered worthy of credit, the claim was decreed in favor of plaintiff, appellant. 1615

See Action, Parties to, Nos. 4, 5, and 6.

Evidence.

BUTWARAH.

1. In this case, in the summary case, 11th March 1814, collector based on census; petitioner, was that, where property was partitioned between Government, and partly of individuals, its partition should be made under Regulation XIX of 1814, and that in this case, where the party partitioned his property with a co-sharer, by a private arrangement, that precedent had been misapplied. 273

2. Held, that where the lands of an estate were not held by the proprietors in joint tenancy, but in separate possession, as in the case of the whole estate for the purpose of apportioning land in proportion to the jumma of the shareholders who had severally entered into engagements with Government for their respective portions of revenue, could not be insisted upon by one of the proprietors under the provisions of Section XXX Regulation XIX of 1814. 1376

3. The lower court misadvised a case, first, as the civil court could not interfere as to the possession of lands assigned by a butwarah, under

Regulation XIX. of 1814 ; second, as co-sharers, parties to the butwarah, had not been made defendants ; third, as plaintiff had sued, not for the original lands, from which he alleged he had been ousted, but for others exchanged for them by the butwarah.

Held, on the first point, that the civil court could interfere, so long as the assessment on shares was not altered ; on the second point, that, as all interested had been made parties, that was sufficient ; and on the third point, that the suit would lie, as the lands the plaintiff sued for represented the lands he alleges he originally held ... 1297

CAZES.

The courts have not jurisdiction to entertain claims for cancer marriage fees ... 1196

CIRCULAR ORDER, 11th January 1839.

See Wasilat, Nos. 1 and 2.

CIRCULAR ORDER, 17th July 1846.

See Execution of Decrees, No. 9.

CHAMPERTY.

Held, that a suit will lie upon an agreement for payment of a sum of money, in consideration of assistance to be given in prosecuting or defending a right. But there must be proof that the assistance promised was actually afforded, and received by the defendant according to the agreement, and that the compensation claimed is not exorbitant, but one to which the plaintiff is fairly and honestly entitled. Case remanded for re-investigation ... 1319

CO-SHARER.

1. Where one of several joint sharers granted a putnee, whether benamsee, for his own benefit only, or as for all sharers, to defendants, and kept him out of possession, and collected the rents till the criminal court put him in possession, the defendants were entitled to have an account of the collections before being sued by the co-sharers for rents 143

2. Where a party sued to remove a building built by a co-sharer erected on land the joint property of both, it was held, as he at the time made no objection to its being built, but only complained that his co-sharer would not allow him to build on other land held jointly by them, and that such refusal was likely to cause a breach of the peace, that his present demand for the destruction of the house could not, under the precedent of this Court of 18th August 1856, be complied with ... 1429

CONSIDERATION.

See Sales, Private.

„ Evidence, No. 2.

CONTRACT.

1. Plaintiffs sued to recover the value of an elephant hired from them by one of the defendants, Gholam Hossain, which elephant plaintiffs declared had been wantonly destroyed by the said defendant. As plaintiffs were unable to prove the charge of wanton destruction, the claim against

this defendant was dismissed. Also, a claim for hire, at a certain rate per diem, was dismissed, as the claim was calculated contrary to the terms of his alleged contract with the plaintiffs.

2. The contract between the parties was held to be a mercantile transaction similar to those entered into by the parties in the cases cited, and special appellant was declared entitled to the full value of the indigo seed according to the terms of the contract.

3. Two parties have exchanged plots of land, and the exchange having been fully carried out, it was not competent to one of them to bring an action to cancel the agreement, because the other opposed his attempt to build upon the land he had received.

4. Plaintiff having granted receipts for rent to the defendant on transfer to himself of acquittances for rent due by plaintiff's lessors to defendant, those receipts held to exonerate defendant, as the acquittances given for them were so given under plaintiff's own proposed arrangement and under his written consent.

5. Plaintiffs sued for the difference between the sum which they had actually received and that which they ought to have received under the terms of the engagement entered into between them and the ancestor of the defendant, Rajah Grishchunder Roy, by which engagement the defendant bound himself to pay annually the sum of sicca rupees 3000 to the plaintiffs, depositing, as security, in the hands of the register of the Sudder Court, Company's papers to the amount of rupees 60,000, bearing interest at 5 per cent.

Defendant pleaded, that he was not liable, that the engagement was personal to Rajah Grishchunder and did not bind his heirs, and that, even if he were originally liable, as the deficit complained of arose from the unauthorised acts of the plaintiffs themselves, he could not be made liable to the present action.

Held that, as the deficit has arisen in the present instance from no act of either party, but from the paying off of the 5 per cent. loan in which the paper originally stood, defendant is, under the engagement, liable for any deficit that may have arisen from that cause.

Held that, as the plaintiffs are able to show that papers only to the amount of rupees 42,000 were, on the paying off of the 5 per cent. loan, converted into the 4 per cent. securities, they are only entitled to the difference between the rates of interest on that amount.

Held, also, that as the papers are still in the name of the original holder and therefore his heir's property, the mere fact of their being irregularly transferred by order of this Court to the custody of the plaintiffs with an encagement for the payment of interest, and their not being produced in Court, are not sufficient to deprive the plaintiffs of their right to a decree in an action like the present. Had, however, from the evidence on the record, the Court any doubt as to the party with whom the property in the paper at the present time rested, it would not have given plaintiffs a decree without the production of the Government securities.

Difference between the interest upon rupees 42,000 at 4 per cent. and 5 per cent. from 1245 to 1256, decreed, with interest.

6. A charge of misfeasance against a manager, on a deed, held not to be proved, and plaintiff's claim for damages dismissed.

COSTS.

1. Held that, where the lower court held, that the titles of other parties could not be questioned in plaintiffs' suit, and exempted them from liability, they should be exempted from costs. 490
2. The collector in this case was sued personally, but the Government appeared for him, and the judge in consequence refused the Government their costs. Held, that they were entitled to their costs, having a right to appear for their officer if they thought fit. 505
3. Lower court's judgment upheld in the award of costs upon certain *pro forma* defendants. 505
4. Decree amended, by consent, as to costs, which had been incorrectly calculated. 749
5. Petitioner, being no party to the cause in which he purchased attached property, was not liable to any of the costs. 921
6. Lower court's order modified as to costs charged upon a benamtee instead of real defendant. 938
7. When one of the parties to a suit was on appeal declared not affected by the decree, it was held to be unjust to charge him with the costs of appeal, which were directed to be charged to the plaintiff. 1013
8. Held, that one of the defendants who appealed on the subject of costs was properly held liable for them, as he thoroughly supported the other defendants in resisting plaintiff's claim. 1063
9. When under a decree of the Privy Council the parties were declared liable for their own costs in appeal, it was held that, of the respondents, that respondent whose interests were as stated, and who derived benefit from the decision, was alone liable for the costs, and that the others, who were, in fact, only respondents in form, though included under the general terms as respondents, should be exempted from payment of any part of those costs. 1089
10. Held, that when the evidence for the plaintiffs was insufficient to establish their claim, it was unnecessary to look at the evidence produced by the defendants, and that, as the plaintiffs' claim was dismissed, they should be charged with the costs of the defendants. 1170
11. Held, that in a case on a bond, in which there were three co-defendants, and in which, on the appeal of one defendant, the decree of the lower court was reversed, the non-appealing defendants are not entitled to their costs in the court below, though they benefit by the decree passed by the appeal of their co-defendant. 1403
- Order of the judge reversed. 1403
12. Held, that as the judge has not explicitly stated the peculiar circumstances of the present case, but has distinctly found the material issues of the case in defendants' favor, they are clearly entitled to their costs, under the general rule, that costs should follow the result of the case. 1552
13. Held also, that under the finding come to by the court, the plaintiff was not liable to a fine for having brought a vexatious and unfounded suit; and that the law does not in any case authorise the imposition of double costs. The decision of the lower court altered accordingly. 1584
14. In a case where defendant was sued both on his own account and, subsequently, as representative of another defendant, and in that

second capacity, pleaded a document of title which was proved not to be a true one, plaintiff having died and no one having represented him the suit was struck off for default.

Held, defendant might have his costs, he not having on his own account set up any untrue document of title, and the suit having been dismissed when he appeared as the representative of another defendant.

See Irrigation, No. 1.

CURATOR'S ACT.

An application was made by the widow of Bishonath Muijoomdar to execute a decree made in his favor in Rajshahye, and opposed by petitioners acting under a will propounded in Rungpore. The zillah judge's decision thereon, being confined to his opinion of the widow's being the natural guardian of her son, does not involve her right to act as manager of her husband's estate; and the matter is accordingly remanded to the judge for re-consideration.

DAKHILA.

See Receipts for Rent.

DAMAGES.

In a suit for damages for the destruction of certain specified crops by cattle, the Court held there was no proof of the principal defendant's having given orders on the subject, nor in fact of the crops having been destroyed, as alleged, while the darogah's report, on which the lower court had relied, spoke of the destruction, not only of the specified crops, but also of other crops, and was therefore far from conclusive. The decree of lower court was accordingly reversed, with costs.

See Action, Cause of, No. 8.

DEBT.

Defendant resisted claim of debt on certain bonds made by his agent with the plaintiff, on the ground that his agent exceeded the authority vested in him by the terms of his karbarnamah; but the loans had been recognised by defendant, and the monies paid to his use and benefit, and he could not recede now from his liability. As, however, a set-off was pleaded, case was remanded, in order that the accounts might be sifted.

DECREE.

1. Declaratory judgment of the dates, from which certain transactions are held to run, and by which the term of limitation in future suits regarding them ought to be reckoned.

2. Plaintiffs, claiming to be in possession, sued for a declaratory title and to set aside a deed of sale and other proceedings. The moonsiff decreed for plaintiffs, and the judge, though finding that the plaintiffs were not in possession, confirmed the order. It was held by this Court that the moonsiff's decision, declaratory of plaintiffs' title on the assumption of their being in possession, could not affect the possession of the defendant, special appellant, nor enable them to eject him, and that as the

judge's order, confirming that of the mooniff, merely determined the plaintiffs' title, there was no ground for interfering with the decision of the lower court

DECREES, LIMITATION AS TO.

A calculation of fees entered in a decree cannot be disputed more than twelve years after the date of the decree

DECREE

See Execution of.

DEFAULT.

1. Summons three times at intervals of a week required, as ruled by Sudder Dewanny Adawlut Decisions, 24th April 1851, page 217

2. Under the circumstances of the alleged default, the suit might have proceeded. Remand

3. Plaintiffs appeal from the order of the lower court dismissing their suit, urging that, as they had no other document to file than those which they had filed with their plaint, the lower court should have investigated their case on the merits, and not have dismissed it in consequence of their being in default in the matter of filing their exhibits.

Held that, as appellants did not state to the lower court that they were unable to file any other documents than those already filed, the Court sees no reasons to interfere with the order of the lower court, which will have only the effect of a nonsuit.

Appeal dismissed, with costs

4. Appellant having demised, and six weeks' notice having been duly given for the appearance of heirs, and none having appeared, the case struck off on default

5. The order of the court below, dismissing petitioner's suit on default, affirmed, inasmuch as it appears that the defendant's answer was filed more than six weeks previous to the date on which petitioner's replication was filed

6. Case below struck off for default while special appeal from order of remand by lower appellate was pending here.

As special appellant cannot show that he took any steps to apprise the court below of appeal here pending, order on default held to be quite legal

7. In regular and summary cases where the pleaders or the parties are not present when a case is called on for hearing, the proper course to be followed, as laid down by this Court in their decision of 24th April 1851, page 279, is to summon the parties three different times at intervals of a week before removing the case from the file

See Jurisdiction, No. 8.

DEFAMATION.

1. Action for defamation should have been tried, not rejected on grounds of expediency.

Remand

2. The plaintiff sued the defendants for damages, because a story injurious to the reputation of the plaintiff's wife was bruited about by

them, and made the subject of inquiry by a punchayet in consequence.

The suit was dismissed by the lower court.

In appeal, the Court held that there was no proof of previous enmity or ill-feeling on the part of the defendant towards the plaintiff, from which malice could be inferred; and that, under the peculiar circumstances, of Hindoo society, the open discussion of the scandal, with a view to the summoning of a punchayet, could not be regarded as evidence of malice. Appeal dismissed, with costs. 1338

DEPOSIT.

The brother of deceased, a Mahomedan, arranged with deceased's widow and daughter, depositing certain property with a friend, to be made over to the daughter, if the widow's suit against him were withdrawn or dismissed. The suit being in her favor, even did the decree not cover the whole of the property with the depository, the daughter could not, under the terms of the agreement, claim any part of it. 960

DISTRAINT.

The said answer did not collide with the distrainer in the sale of plough bullocks, and was not liable to damages. 831

ENDOWMENT.

See Hindoo and Mahomedan Law.

ESTOPPEL.

See Evidence.

EVIDENCE.

1. Suit by a proprietor of a permanently settled estate to recover land belonging to that estate, which was declared by defendant to be lakhiraj, was adjudged in plaintiff's favor upon the strength of a statement made by defendant in a resumption suit, that he paid rent under the estate to the remainder; but it is held in appeal, that this statement is not conclusive against defendant, and that the statement, possibly untrue, does not create a title in favor of plaintiff. Accordingly the case is remanded to be disposed of on its merits. 42

2. The presumption from the admitted execution of the deed, and from plaintiff's possession for two years under it, being that the recital in the deed of the passing of consideration was correct, till the contrary should be shown; held, that the burden of proof of no consideration was on defendant.

Held, on the evidence and probabilities, that the consideration did pass.

Appeal dismissed. 300

3. A special appeal was admitted to try whether parole evidence could be admitted to alter the express words of a deed.

Held, that parole testimony, though admitted to explain, cannot be received to vary, contradict, or subtract from the terms of a valid written instrument. 362

4. Copies of letters and registered receipts of letters sent from the one party to the other, were put in as evidence of a notice to defendant to attend and make delivery of indigo according to an agreement.

Held, that although the plaintiff should more fully have proved the letters by the testimony of the writer or others cognizant of them, still, with reference to the transmission of letters on the dates in the receipts to the defendant's not showing what other letters came under those receipts, and to the testimony of plaintiff's witnesses generally, the proof of plaintiff's having performed his part of the contract and having called upon defendant to deliver the indigo, was sufficient.

Held also, that the evidence of plaintiff's witnesses in connection with the statement of defendant, as to the quantity of indigo manufactured in 1853, was such as to require no interference on the part of this Court with the judge's decision as to this point.

5. Appeal rejected, kistbundee, now repudiated, having been admitted by appellant in the lower court.

6. In a suit where one party asserted that a separation had taken place in family only, and the landed property continued to be held jointly, but the other party averred the contrary, it was found that the lower court had not thrown the burden of proof upon the defendants, or gone on their proofs only, but had rightly weighed the proofs of both sides, and decided on the merits. Appeal dismissed.

7. Held, that in an action of detinue, in which the plaintiff sues to recover certain specific articles or their value, it is incumbent on plaintiff, if the defendant plead the general issue and the specific articles be proved to have been in defendant's possession, to prove the value of each article before an alternative judgment can be given in his favor.

Held, also, that cases of this nature are not within the same category with those in which, on a special plea being alone pleaded and not proved, that failure entitles the plaintiff to a decree for his claim as laid in the plaint without further evidence.

Case remitted for further investigation.

8. The suit was brought for possession of a mehal on an alleged deed of compromise, by which defendant was stated to have transferred such mehal, and on an alleged admission in a plaint, where present defendant was plaintiff, in which plaint, it was alleged, the receipt of the consideration for such transfer was admitted.

Held that, in considering alleged admissions, it is of the first importance to adhere to the rule of evidence, which prescribes that the whole statement containing the admission be taken together, as by this means alone can the true nature of such admission be ascertained.

Held also, that, under this rule, there is no admission in this case of the receipt of rs. 72,000 for the defendant's own purposes, or of its appropriation for objects other than the payment of plaintiff's (the Nawab Nazim's) debts. Nothing was shown to prove that any consideration passed from plaintiff to defendant to justify the conclusion, that the defendant had still to account for rs. 72,000, and had given up the mehal sued for to plaintiff for that reason.

9. The special appeal was admitted, to determine whether the defendant was not bound by an admission made by him, in another case, as regards his jumma; but as the special appellant was unable to show that the respondent had made a distinct admission that his jumma was rs. 110, and the judge had found that the kubooliut on which the suit was brought, and the accounts filed in support of it, were spurious, and

- that the pottah held by the defendant was valid, the appeal was dismissed ... 624
10. Plaintiff having, in his petition for mutation of names, admitted transfer by sale of his estate, and receipt of consideration, could not sue to reverse the sale ... 703
11. Where the appellant claimed certain lands in a Government estate as lakhiraj, which claim was disallowed, and the lands directed to be assessed as other lands held by ryots, and, when part of these lands were given up by Government to another talookdar, whose claim to them, as forming part of his estate, was considered valid, though the appellant opposed his claim, affirming the land to be lakhiraj, and afterwards brought this suit for possession on the ground of a right of occupancy as a ryot; it was held that the appellant's former assertion, though contradictory of his present, did not amount to a complete estoppel, though it was evidence against the validity of his present claim ... 726
12. Defendant mortgaged certain property to plaintiff as security for the loan. The mortgaged property was sold in execution of decree held by a third party, and purchased by Kanyalall and others. Plaintiff brought a suit against the mortgagor, making the auction purchasers defendants, who claimed the property, pleading that the debt to plaintiff had been more than realised from the usufruct. On enquiry the judge found such to be the case, and, reversing the order of the lower court, he dismissed the suit. In special appeal, it is urged that, though the judge might have released the property claimed by the auction purchasers, he should not have released the mortgagor, who admitted the debt to be due. As, however, the mortgaged property could not have been released, had any part of the debt to plaintiff remained unliquidated, the finding of the judge on this point necessarily decided that the debt had been extinguished, and, therefore, his order dismissing the suit was held to be correct ... 752
13. Held, that a declaration by one defendant, that he is willing to abide by whatever statement certain parties may make, is only binding on him. It cannot affect any co-defendant of the party making the declaration.
- Case remanded to the judge, in order that he may, as to the co-defendant of the declaring party, decide the case either in his favor or against him, looking to the evidence on the record ... 803
14. Lower court rightly decreed possession, when defendant could show no title to eject plaintiff ... 827
15. Defendant having withheld the best evidence in his possession, the Court declined to place any reliance on the inferior evidence which he tendered ... 846
16. Held that, in a Hindoo family, when one of the members claims separate possession, it is incumbent on him to prove such plea; and in the present case, as the plaintiffs' vendors did not deny their purchase, the judge was right in requiring defendants to prove their special plea ... 857
17. Special appellant sued summarily for rent on an ikrar alleged to have been executed by the respondent, and subsequently filed a dowl, also said to have been given by the respondent, and obtained a decree in the collector's court. Respondent instituted a regular suit to set aside

the summary award, and to declare the documents filed by special appellant before the collector spurious. The principal sudder ameen, who tried the case, in his proceeding under Section 10 of Regulation XXVI. of 1814, called upon the special appellant to prove the documents propounded by him, which he failed to do, and a decree was given by the respondent, which was affirmed in appeal. Held, that, under these circumstances, special appellant, though he had obtained a decree in the collector's court, was bound to prove the documents which he had filed, their validity being the point at issue between the parties, and that the evidence of witnesses taken before the collector was insufficient to prove them. No sufficient reason having been assigned for the absence of such witnesses before the principal sudder ameen, the plea of special appellant's counsel, that special appellant considered it unnecessary to act till the respondent had done something to prove his own case, set aside, as special appellant was, under the proceeding, required to submit his evidence, and did so, but it was found unworthy of credit. Appeal dismissed. 1868

18. When the plaintiffs, claiming a lakhiraj holding, relied upon a particular document filed in another case between other parties by nominal defendants, the moonsiff and judge were justified in testing its genuineness by the plaintiffs' statements in the present suit. Dismissal of plaintiffs' claim, confirmed in special appeal. 1874

19. A special appeal having been admitted, to try whether the judge should have found the fact of the existence of a mookururee lease when the original was not produced and no documentary evidence adduced as to it, held, that, as the judge had found the above fact on the presumptions and probabilities of the case, this point was not open to special appeal.

But the Court amended the certificate, to try whether, admitting the facts as found by the judge, they showed a sufficient title to bar the zemindar from re-letting the land.

Held, that as the best evidence in defendant's favour was the pottah, and was, at the command of defendant, and he did not produce it, the presumption was against his entire plea. 1048

20. Copies of depositions taken in other cases cannot be received as evidence of the facts to which they relate, unless it is shown that the witnesses who emitted those depositions are dead, or cannot be produced. 1084

21. Held, by the majority of the Court, that, when a plaintiff sues to recover a sum due under a bond, and the defendant denies the execution, and avers that he had never been indebted to the plaintiff or had never received any consideration for such an instrument, the first issue is the fact of execution; that proof of this is upon plaintiff, and, on this being proved, it rests with the defendant to prove that the consideration mentioned in the proved deed is an untrue consideration, or that the deed discloses no real transaction; and that the lower court, in considering that not only the proof of execution of, but also of the receipt by defendant of the consideration mentioned in, the deed, rests primarily with the plaintiff, has, both under Section 10, Regulation III. of 1793, and the precedents of this Court, erred in the application of a rule of the law of evidence.

Case remitted for re-investigation. 1231

22. Held, that, as the allegations on which plaintiff's suit was based turned out to be untrue, notwithstanding the fact that the averments of the defendant were untrue also, it was incumbent on the lower courts, considering simply the absence of all proof of plaintiff's claim, as brought by him, to have dismissed the suit, and not to have given him a decree for property which, on the evidence, he is entitled to, if at all, on a title other than that on which he sues.

The decisions of the lower courts reversed, and special appeal decreed, with costs ... 1286

23. Held, that, where the party pleading, as in this case, property to be self-acquired, has, by a previous petition in a court of justice, admitted it not to be so, and this admission is found as a fact by the lower courts, such admission is conclusive evidence against the party making it ... 1291

24. A party who receives the proceeds of a sale in execution of a decree cannot afterwards sue to reverse the sale. He must be held to have waived his objections to the sale, and is estopped by his own act ... 1295

25. A special appeal having been admitted to try whether the judge, in suits for the recovery of rent by a ganteedar, in which defendants pleaded the non-execution of the documents on which plaintiff claimed rents, and that they held their land of another proprietor, had rightly thrown the burden of proof on the defendants.

Held, that where plaintiff sued on alleged agreements from defendants to pay him rent, it was for plaintiff to prove such documents before defendants could be called upon to prove their plea that they held from others, no previous relation of landlord and tenant being apparent between the parties.

Held, also, in separate cases, that where there were previous decrees between the parties, such decrees were conclusive, although the plaintiff sued on an agreement in those cases also ... 1340

26. Plaintiff, having admitted in an action against himself and his co-sharers his own responsibility on the ground of sole enjoyment of profits, held to have no action against his co-sharers on account of profits having been taken from him exclusively ... 1476

27. Defendant having been in the habit of procuring goods from a shopkeeper and granting vouchers for the same, the onus of impeaching these vouchers thrown upon the defendant ... 1504

See Bond, No. 1.

„ Putnee, No. 1.

EXECUTION OF DECREES.

L. A suit was instituted to set aside an execution sale of lands, consisting of four kittas or portions; and the first court decided for the plaintiffs, but the zillah judge on appeal nonsuited the case, as the zemindar, who appeared as a third party, and professed to be in possession of one of the four portions, had not been made a defendant in the suit.

Held in special appeal, that the sole issue to be tried in this action was the validity of the execution sale; that the zemindar could not be

- required to plead to this issue ; and that his possession of the land, as asserted, could not be prejudiced by a decision made in his absence ... 24
2. On the reversal of a sale in execution of decree, the first court ordered reimbursement of the purchase-money to the petitioners. This order was upset by the lower appellate court. On appeal to this Court, the last order was upheld, as there had been no allegation in the pleadings, and no proof on the record, that the plaintiff had had the benefit of the sale proceeds, and petitioners, in their answer, had not made any allusion to the purchase-money, or claimed its restoration ... 37
3. The sale notices, though not signed by the parties named, were sufficient under the law. The plea, that the purchaser did not pay up his bid, was, under the circumstances, quite invalid. The mortgage bond was accepted by the decree-holder, merely as security against loss if he allowed the rajah further time to pay up, and was no bar to sale of his estate. Appeal dismissed ... 215
4. Held that the orders of the lower court are without jurisdiction, as it was not competent to the principal sudder ameen, under repeated precedents of this Court, according to the law applicable to the case, to revive execution of the decree of the judge's court, which had been referred to him for execution and had been struck off, without a renewed reference to him by the judge ; that, moreover, Act XXVI. of 1852, Section 1, did not apply to this case, inasmuch as a petition had been presented for the enforcement of the decree to the judge previously to the passing of that enactment.
- Special appeal decreed, with costs ... 221
5. In the decree under execution, interest upon wasilat was ordered to be paid from a *fit* date.
- Held that, as this expression is indefinite, interest should run from the date of ascertainment of principal ... 223
6. Petitioner purchased a decree obtained by one Gunganarain Chowdhree against Brijesshuree, and subsequently applied for attachment of certain property, consisting of golahs, in execution. On the day following petitioner's application, a party claimed the property as having on that day been sold to him by Deenonath, the son of Brijesshuree. Nothing further was done by petitioner in execution at the time. The claimant then instituted a regular suit to try the validity of his purchase from Deenonath, and on petitioner's again moving the court in execution, the lower courts have refused to inquire summarily into the *bona fides* of the sale, as a regular suit has been instituted for that purpose.
- Held on special appeal that, notwithstanding the institution of a regular suit by the claimant from Deenonath, petitioner is clearly entitled to a summary inquiry on the same point in execution.
- Case remitted to the lower court for inquiry, first, whether the decree purchased by petitioner was a personal one against Brijesshuree, or whether it was for a debt incurred on behalf of her husband, and, secondly, if the latter, whether the transfer to the claimant, Bhugwan-chunder Chuckerbuttee, be *bona fide* or not ... 225
7. Suit brought by purchaser at an execution sale to recover his purchase-money (still in deposit,) on the ground of the sale being set aside on proof of the debtor's having no title to the property sold. Judgment

having been given for plaintiff, the decree-holder in the execution case urges in special appeal that, with reference to the decision given at page 1091 of Decisions of 1857, the suit will not lie.

Held, that, as special appellant in his answer denied his liability for the sale which he ascribed to the collusion of his pleader, he substantially gave up all claim to benefit by the purchase-money ...

324

8. In a suit by a purchaser at execution sale against the decree-holder, for possession of a share of estate, in which he had bought the rights and interests of the judgment debtor, less certain alienations made prior to notice of sale by deeds, which were not shown to be other than genuine, plaintiff was unable to show what his purchase comprised: to no decree therefore for the same could effect be given. Order of lower court reversed ...

346

9. Held, that under Section 20 of the C. O., dated 17th July 1846, a civil court, making a sale in execution of a decree, is authorised to interfere summarily and give possession of the property to the auction purchaser when opposed by the judgment debtor, or a claimant whose claim has been disallowed previous to sale ...

384

10. A decree-holder in 1845 took out execution against his debtor; certain monies in deposit were attached, and the decree-holder was directed to file a receipt for the amount and to take away the money, and the decree was declared in July 1845 satisfied to the above amount. No receipt, however, was filed, and the sum in deposit went to pay other debts of the debtor.

Held, on special appeal, that the decree-holder was at liberty to take out execution of the *whole* decree obtained by him against the debtor, and that the order of the judge, dated July 1845, declaring the decree satisfied to a certain amount, was conditional on the receipt of the money by the decree-holder and on his filing a receipt; and, as he did neither, no satisfaction of judgment resulted.

Case remitted to the judge, with directions that he will remand it to the principal sudder ameen, who will pass the necessary orders in execution in conformity with the above remarks ...

386

11. As in the case of sales set aside as invalid, so of sales reversed, the purchaser, under Regulation VII. of 1825, is entitled to receive back his purchase-money on restoring the purchased property ...

450

12. The plea that the rights and interests of one judgment debtor only were sold was not proved. Where clear proof is not given that distinct shares of a jumma are so recorded in the serishta of the superior landlord, the tenure must be treated as a joint one, and thus liable, under Section 15, Regulation VII. of 1799, to sale for the default of one; the tenure itself being that to which the superior landlord has to look for the realisation of his rent ...

473

13. Held, in accordance with the principle laid down by the Court in the case of Maharajah Koowur Kerut Singh *versus* Mussumat Rane Sreemuttee, that any thing which has been determined by order in execution in a former suit, and which was necessarily to be determined as being involved in the subject matter of the suit, and as being essential to any operative decree being passed upon it, must be held to be finally disposed of by the order, and, consequently, within the terms of Construction 1129.

Held also, that when, in execution of a decree for a share of a property, the defendants in that suit or any third parties claim certain lands taken in execution as belonging to property *other than that decreed*, on such claim being rejected summarily it is competent to the claimants to institute a fresh suit for the lands, on the supposition, wrongly included in the suit to which, in the character in which they now claim, they were not parties.

Held, therefore, that the principle of Construction 1129 does not apply to the case before the Court. The special appeal dismissed, with costs 493

14. Under the circumstances of the case, interest was disallowed to the decree-holder upon a sum held in deposit on his account, but not paid, pending result of an appeal of the party cast, for the period of pendency of the appeal. The decree-holder did not offer to draw the sum on security for eventual fulfilment of orders on the appeal. As the money was available, there was no risk lest it should not be paid, and no interest could, therefore, be allowed to compensate for such a risk 560

15. Held that, as the bond debt in this case was clearly held, by a final decree of a competent court, to be a personal debt of a certain party, it could not be realised from the estate of the deceased husband of such party 562

16. Lower court's order was correct, making the brother and widow, who were in joint possession of deceased's property, liable for the decree against him 695

17. On a special appeal to the effect that an order relating to costs was equally applicable to meane profits, held that it was so in this case, as in it two decree-holders hold decrees against each other, and these decrees, with all such items as they comprised, should be debited and credited in adjustment of the respective accounts 697

18. The old decree to the plaintiff in a former case gave him possession as mookurureedar during life, and the zemindar liberty after his death to make a new settlement. Order of the lower court in executing the decree accordingly confirmed 719

19. Deceased's transfer of his dewutter to his wife as shevait, having been made in fraud of his creditors, decree-holders, there being no other property to satisfy the decree, lower court was correct in not upholding it 730

20. The co-debtor's property could not be sold on an attachment of the other debtor's property only 925

21. The contingent order of a judge in a former suit was no bar to sale in execution of his decree of a mookururee tenure: suit to reverse the sale dismissed 956

22. In the one appeal the Court held, that where the debt was that of a deceased husband, and the rights and interests of the widow defendant, as the representative of her husband, were sold, and the widow at the time of sale was in possession of her husband's property for her life, under a deed to that effect, and with her son had kept the auction purchaser out of possession, the decree of the lower court against the widow and son was correct.

In the second appeal the lower court's order, charging those defendants who were widows of the decree-holder with plaintiff's costs, was

reversed, because their answer only urged that they should not have been made defendants and obliged to plead, and the plaintiff had forced them to appear and plead, by making them substantial instead of *pro forma* or precautionary defendants only ...

996

23. A having two personal decrees against B, for different debts contracted on security each of a moiety of a certain talook, A was justified in suing out execution of the later decree upon the whole talook ...

1009

24. The lower courts held that, to enable a decree-holder to share ratably in sale proceeds, he must apply within thirty days after the sale.

Held, that this is not so, but that the circular order of the 26th January 1844 prescribes distribution shall take place thirty days after sale, and no application shall be received after the distribution ...

1114

25. Held, that when a principal sudder ameen has declared in execution certain property to be endowed property, and the possessor of it solely a shevait, and released it accordingly, it is not competent to a subsequent principal sudder ameen, in execution of the same decree on petition by the decree-holder, to declare the property to be not endowed, and thus summarily to reverse the order of his predecessor. That order, which was not appealed against, must be reversed, if at all, by a regular suit. The mere fact of the present shevait being a person different from the shevait in possession when the first order was passed does not change the nature of the property.

The special appeal is decreed, and the order of the lower court reversed ...

1121

26. There was no reason to interfere with lower court's order, exempting from sale in execution property of which it found a party in possession ...

1157

27. A certain order of the judge reversed, and case remanded to the judge, in order that he may consider and record with care and clearness the reasons which may lead him to reject any portion of the petitioner's prayer, and grant that portion of it which may to him seem to be in accordance with the decision of the Privy Council ...

1218

28. Huromonee, the wife of Bhoobunchunder, sued Taramonee to recover possession of some property. The suit was dismissed, and Taramonee's costs were made payable by Huromonee. She died shortly after, and her husband's (Bhoobunchunder's) property reverted to Anundmoyee, the mother of Bhoobunchunder. Taramonee now seeks to recover costs from the property of Bhoobunchunder in the possession of Anundmoyee, on the ground that, as Bhoobunchunder's property would have benefited had Huromonee been successful in her suit, so it should also be held liable for costs when the result was unfavourable.

As the costs appear to have been charged to Huromonee personally, and the property for which she sued was no part of her husband's ancestral property, and as Taramonee had allowed so long an interval to elapse before enforcing her decree for costs, and the property had in the mean time passed into the possession of Anundmoyee, who inherited, not as heir of Huromonee, but of Bhoobunchunder, it was held, that, unless it could be inferred from the decretal order that the costs were chargeable to Bhoobunchunder's estate, the liability of that estate for the payment of such costs could not be determined summarily in an execution of decree case. Appeal dismissed ...

1219

29. Previous attachment under Regulation II. of 1806 cannot prevent decree-execution, nor were the decrees here in question shown to be collusive ... 1221
30. The sale deed of the uncle to his nephew, a minor, was a transfer in fraud of creditors: payment of consideration money or possession by transferee not proved. The execution-sale could not be stayed ... 1222
31. Lease made *pendente lite* is not valid against a decree-holder ... 1223
32. A brought B's decree against C, who held another lesser decree against B, and A begged the court to sell C's decree. This was for maintenance, and could be realised without sale by deducting its amount from the debt contained in the decree for B against C, which A had bought ... *ib.*
33. Held that it is competent to a judge, if he thinks that the evidence of any person on the record before him is tainted with perjury, whether that evidence have actually been recorded before himself or not, to summon the witness and order his commitment, to be tried for perjury.
- Held also, that, pending a special appeal, which could only be on a point of law, there was no ground to interfere or stay the judge's order on the above point ... 1224
34. Held, that, in the case at page 1665, Decisions of 1858, plaintiff did sue for reversal of a sale, and that plaintiff, in suing for possession, which he could not obtain without cancelment of a sale, made his claim as for possession by "cancelment of the sale."
- Held also, that where plaintiff received the mesne profits, he is in the first instance the proper person to account for them to defendant. Application for review rejected ... 1230
35. Held, that Section 12, Regulation XLV. of 1793, the law under which the sale in the present case was made, imperatively requires that the place, date, and hour of the day fixed for the sale should be mentioned in the proclamation of sale, and that the proclamation should be published in the mofussil as well as other places mentioned, *for a term not less than one month before the sale takes place, according to the proclamation*; and that, as the requirements of the law in this particular were not acted up to in this case, the sale is liable to reversal. The publication of the proclamation is intended to give notice to purchasers, and, if that be incorrect in the matter of date, that important object is defeated. Special appeal dismissed, with costs ... 1236
36. When, in execution of a decree, a lot was advertised as comprising mouzah A five villages, without further specification of names, and sold according to the advertisement, the omission to mention the number of villages comprised in the lot, in the list of lots sold suffixed to the sale proceeding, was held not to bar the auction purchaser's right to all the villages comprised within that lot. It was held, further, that, though the records of the collector's office and the sale proceedings did not disclose the names of all the villages, yet, as the auction purchaser was able to show by other evidence that the villages in dispute were comprised within the lot sold to him, he was entitled to possession ... 1234
37. Application for review of the judgment at page 1056 of the Decisions of 1858 made on two grounds: *first*, that notification of

- sale was not issued for thirty days previous to sale; *secondly*, that the court making the sale has discretion, under Section 7, Regulation IV. of 1793, to select portions of property for sale in execution of the decree. Held, that, as the sale notice had been issued on the spot at the same time as the proclamation of sale was made, the requirements of the law, Clause 2, Section 3, Regulation VII. of 1825, had been fully carried out; and, further, that the court, under the provisions of Act IV. of 1846, had no power to select what property was to be sold in execution of the decree, the selection being left to the decree-holder. The plaintiff's application for review was rejected ... 1367
38. A purchaser at a decree sale, failing to make the deposit required by Section 5, Act IV. of 1846, is liable for any deficiency resulting from a re-sale ... 1370
39. Held, that, under decisions of this Court of 13th November 1857, page 1603, and 30th April 1858, page 899, an incorrect entry, in the proclamation, of the amount for which a sale in execution of decree is to take place, is a material defect, and renders the sale liable to be cancelled.
- Held also, that the fact of the vakeels of the parties having colluded to purchase the property advertised for sale, formed no ground for reversing the sale summarily, though it might be a reason for cancelling it in a regular suit ... 1403
40. Held, that the order of the judge, in a case in which the papers had been burnt by the rebels, refusing to take any steps in execution of the decree alleged to have been passed in petitioner's favour, simply because the decree is not forthcoming, cannot stand; and that, as the destruction of the decree was caused by the acts of third parties, the decree-holder, if possible, should not be endamaged by those acts, but the Court should attempt to place him as nearly as possible in the position he would have been in had the decree been forthcoming.
- Case remitted with definite instructions to the judge ... 1411
41. Held, on a consideration of the circular orders and constructions of the Court, and the precedents as far as they go, the reason of the thing, and public convenience, that a party, in order to be entitled to claim a ratable share of the proceeds of the sale, must have made an actual attachment on the property before the time fixed for sale, and that the procuring simply an order for attachment is insufficient.
- Held, that, as the claimants in the case before the Court admittedly did not make such attachment, but only procured an order for attachment, they are not entitled to share in the sale proceeds of the property.
- Judge's order reversed, and, in opposition to Mr. Sconce's order, the petitioner, who brought the property to sale, declared to be alone entitled to the assets of the sale, with all costs ... 1417
- Held, that the Court, on re-consideration, sees no reason for receding from the view which it took when the matter was laid before it, which is to the effect that, under the right reading of the circulars and constructions of this Court, it is necessary that an effective attachment be made before the day of sale, in order to entitle a party to share in the proceeds of sale. Application rejected, with costs ... 1688
42. Judge's opinion that a decree sale was invalid, because, under construction 1027 and the circular order of 11th August 1843, it

ought not to have taken place for three months after the rejection of the objections raised, held to be erroneous, as the circular and construction related to the retention of the proceeds of sale, and not to the sale itself.

An objection to the sale which was not set forth in the plaint ought not to have been made the subject of adjudication by the judge, whose duty it is to decide *secundum allegata*.

Under Clause 3, Section 3, Regulation VII. of 1825, the irregularity which invalidates a sale must be a material irregularity, one which has produced or may produce substantial injury to the person who seeks to take advantage of it in order to set the sale aside ...

1425

43. Objections were made to the sale of certain landed property, in execution of a decree, obtained by the zemindar against the holder of the property as a tenant. With reference to the alleged sale having been made by the father to one of his sons, and other circumstances of the case, defect of evidence of sale and payment of consideration, and registration of the deed after institution of the suit by the zemindar, the Court upheld the lower court's order, which treated the transaction as collusive and in fraud of creditors ...

1433

44. Held, that it is not competent to the principal sudder ameen of one district to sell real property situated in another district; but if a decree-holder desire to have property, situated in a district other than that in which the judgment was pronounced, brought to sale in execution, he must proceed under Act XXXIII. of 1852 ...

5413

45. Plaintiff saved an estate, which he had caused to be sold in execution of decree, but of which the purchase-money had not been paid up, from sale for arrears of revenue by discharging the balance. Held, that as the execution of his decree was still incomplete, he had such an interest in the estate as entitled him to make the payment, and to claim reimbursement from the owner under Section 9, Act I. of 1845. The purchaser and a person who held a mortgage over the property ought not to have been made defendants in such a suit, as the owner alone is liable under Section 9 ...

1454

46. In the case of a sale advertised to take place on a certain date, but postponed on the petition, as was alleged, of the decree-holder, for fifteen days, which period expired during the long vacation, and the sale took place on the first day that the courts opened, the principal sudder ameen held that, owing to these circumstances and in the absence of any proof that the judgment debtor had applied to the decree-holder for postponement of sale, the sale was invalid. On appeal it was held by this Court that the reasons assigned by the principal sudder ameen for setting aside the sale were inadequate, and the case was remanded to determine other points which arose ...

1497

47. The Court cannot assist in execution one who is no party to a decree, and who is not shown to be connected with the property ...

1563

48. Held, that the present objection of petitioners, that the decree-holder against them has, in execution, obtained more property than that included in the suit, is vexatious, and brought simply with a view of putting difficulties in the way of the decree-holder: 1st, inasmuch as they never in their pleadings objected to the boundaries given in the plaint, and 2ndly, during the pendency of the suit never suggested that those

boundaries would interfere with other property belonging to them in the vicinity.

Application rejected, with costs ..

ibid

49. Petitioner's prayer, that sale in execution may be stayed until her special appeal is heard, rejected, inasmuch as such a course is opposed to the practice of the Court ..

1565

50. Held also by the majority, that the petitioners before the Court, as under-tenants, not parties to the suit, had a right to a summary inquiry with a view to its being determined whether they were entitled to retain possession of their lands or not, and, not having obtained this inquiry, the case must be remanded ..

1685

See Action, Cause of, No. 9.

See Surety, No. 6.

FERRY.

Plaintiffs sued for the removal of a ferry recently established by defendants in the vicinity of their ferries, on the ground that their ferries were public within the meaning of Clause 1, Section 6, Regulation VI. of 1819, and that the establishment of the new ferry had injured the collections at their ghats.

Held, that, though the collections from the plaintiffs' ferries were included in the assets of the zemindaree when it was permanently settled, those ferries did not, in consequence, come within the meaning of Regulation VI. of 1819, and that no action for damages could be brought, on the ground that the establishment of the new ferry was detrimental to the collections hitherto realised at the old ..

629

FORECLOSURE.

See Mortgage.

FORGERY.

See Hindoo Law, Inheritance, No. 8.

FRAUD.

1. Where, according to the averments of the plaintiffs, they purchased a property in mortgage from defendants, by a deed of bye-bil-wufa, and before payment of the whole price to defendants, they, plaintiffs, leased a part of the property, the extent of which was disputed, under a zur-i-peshgee to A B, and defendants then, after service of notice of foreclosure, did not redeem their mortgage, and it was stated that, at some time before or after the said mortgage, C D had bought the property at an execution sale, there was not before the lower court proof that the mortgage and lease were fraudulent and collusive, nor therefore grounds for dismissing the suit without further inquiry. Remanded for re-trial. ..

509

2. In cases of palpable fraud affecting the public interests, including cases in which the process of the court is made use of for purposes of private fraud or malice, the civil judge is at liberty to direct the Government pleader to prosecute the person committing the fraud in the criminal court. He has no authority, however, to issue instructions to the magistrate to put parties on bail or to keep them in custody.

The Judge's order in this particular case, making over the appellant to the criminal court, reversed, as there appeared to be no sufficient ground for imputing fraud to the appellant

1899

See Hindoo Law, Inheritance, No. 8.

See Mahomedan Law, Inheritance, No. 1.

GHATWALEE TENURES.

Held that, in suits brought by a putneedar, standing in the place of a zemindar, to recover possession of certain land confessedly belonging to the zemindaree of which he holds the putnee lease, on the allegation that they have been usurped by the ghatwal, and are in excess of the quantity to which he is entitled, and in which the ghatwal does not deny that the lands are within the plaintiff's putnee lease, Government can have no claim *directly* to the lands, as they were included in the zemindaree at the time of the decennial settlement; but in consequence of the *indirect* interest which Government has in the land, an interest arising from the nature of the service which the tenants perform, and the power which, through custom, Government has long exercised as to their dismissal and appointment, Government is entitled to be made a party to them.

Held also, that this interest is not, in a legal sense, an interest adverse to the zemindar, but it is such a material though indirect interest as, in accordance with the general rule, which lays down that all persons materially interested in the subject matter in dispute, ought to be made parties to a suit, in order that complete justice may be done and the question quieted, requires that Government should be made a party in cases like that before the Court.

Case remanded for re-investigation by the principal sudder ameen, with directions that that officer allow plaintiff a reasonable time to file supplemental plaints, making Government a party, and then accept the answer filed by Government, and pass eventually whatever decision may seem just and proper

637

GUARANTEE.

See Sales, Private.

GUARDIAN AND WARD.

1. Held, that a release pleaded by a guardian as given by his minor ward requires clear and strong proof of its execution, and that, in a case of such relation between the parties, a release of this nature would not, even if proved, be necessarily conclusive.

Held, that defendant, having, as guardian for plaintiff, a minor, received certain bonds as part of plaintiff's share of his ancestral property, was bound to account to plaintiff for them, even if the bonds were on account of the *separate* transactions of the parties and irrespective of their rights as ancestral co-sharers.

Held that, where it was not shown that repayment of a mortgage of part of property was made from other than the joint funds, or that the property was other than joint ancestral, plaintiff was entitled to his share.

Held, that a julkur not being shown to be other than part of ancestral

property, a farming settlement with a stranger on resumption does not destroy the proprietary title of plaintiff according to his share.

Held that, where defendant did not prove his plea that, after receipt by him as guardian of ornaments and clothes, the share of the plaintiff, he, defendant, made them over to plaintiff, plaintiff is entitled to a decree for them

274

2. Held by the majority, that the burden of the plaint in the present case is not that Joykisto and Rajkisto Mookerjee, on granting the putnee lease to the defendant Kaleepersad Roy, acted beyond the power given to them by the will of their father, but that they acted in contravention of their duty as guardians, to the detriment of the plaintiff, and therefore the act so done fraudulently and collusively is liable to cancellation; that, consequently, the objection taken by defendant, respondent, that, as the plaintiff, neither with the plaint, nor subsequently, has produced the will, nor given good reasons for its non-production, nor proved the registered copy filed by him, his suit should be dismissed, falls to the ground. Moreover, as the party who first in the pleadings raised the question of power under the will of plaintiff's father, was the defendant Kaleepersad Roy himself, it was incumbent upon him, if upon any one, to have the original will produced.

Held, also, by the majority, that, even in a case founded on a will in which the evident contention is as to the terms of an admitted, and not the authenticity or genuineness of a propounded, will, the application of the strict rules as to the admission of secondary evidence would be misplaced; and as both parties admit the will executed on a particular day, a registered copy of the same, if the original were in the possession of a third party, and not produced, would be quite sufficient, under the circumstances, for the purposes of the suit.

Held by the majority, that the fact of letting out the property of the minor ward in putnee is of itself an act at first sight so injurious to the party possessing the right of ownership, as, on a suit being instituted by that owner, after reaching his majority, calling that act in question, to throw the burden of supporting it at once on the guardians, or putneedar, or both.

Held by the majority that, though the defendant has failed to show that the grant of the putnee lease to him was warranted by the terms of Jugomohun's admitted will, still he has sufficiently shown that the transaction between him and the executors was not injurious to the plaintiff, or of a character to raise a suspicion of fraud and collusion.

Held by the whole Court, that the evidence of the confirmation by the plaintiff, after he had attained his majority, of the acts of the executors, with reference to the putnee lease granted to defendant, is clear and conclusive.

Appeal dismissed, and the order of the lower court affirmed, with costs

607

3. Plaintiff sued defendants to set aside a deed of compromise entered into with them by his mother as his guardian during his minority, on the allegation of fraud on the part of defendant's ancestors.

Held, that a Hindoo guardian or manager can sell or mortgage the real property of his minor ward in case of necessity, or for the benefit of the estate, and the purchaser or mortgagee, if he has, after inquiries into the circumstances, acted honestly and with due caution,

even though he himself be deceived, will, in case of an action brought to reverse the transaction, be held blameless.

Held also, that, as a general rule, a guardian cannot *lease* the property of his ward beyond the term of his ward's minority, though a compromise entered into by a guardian in excess of this power to stop a pending suit will, unless it be proved to be clearly to the detriment of the minor, be upheld by the Court if questioned by the minor after attaining his majority.

Held, that a guardian may collect and enter into any compromise regarding personal debts due to the minor which he may consider to the minor's benefit. If he enter into a compromise fraudulently, or if he be induced to enter into a compromise by fraud or misrepresentation, the minor can, on reaching his majority, sue both the guardian and the third party to set it aside and to obtain his full rights. If, however, the compromise be not accompanied by fraud, but if it were entered into without the exercise of a reasonable discretion and without due care on the part of the guardian, the minor will have an action against the guardian alone for the amount of loss which may have resulted from the absence of a proper degree of care.

In the present case against the defendant, a third party, there is no sufficient evidence to raise the presumption of fraud on his part. Without therefore calling on defendant's pleader, the decision of the court below is affirmed; with costs

913

4. Case decided on a compromise, under the sanction of the Court of Wards, on behalf of a minor. A party as well-wisher desired to object to the compromise of the minor.

Held, that, as the compromise had been entered into with the sanction of the Court of Wards advisedly, and as the present applicant is a distant connection of the minor, and seems to be desirous of litigation on speculation, no reason exists for acceding to his prayer.

The objection of a party who appeared neither in person nor by vakeel, rejected

1407

5. A stranger allowed to sue for minors when the natural guardians had reasons apparently for not seeking the particular redress asked for

1462

6. A guardian appointed by the civil court has, by Section 5, Regulation XVII. of 1805, the same powers in the management of the estate of the minors as the proprietors themselves. A lease from him in concurrence with the other sharer was, therefore, held valid

1575

HINDOO LAW.

Adoption.

1. Held, that an adopted son is entitled to share collaterally, and the son of an adopted son is entitled to the rights of his father

18

2. Suit by A, as adopted by B, under a power of adoption granted by her deceased husband C, to succeed to his estate on death of D, the natural born son of C.

Held, that the best evidence of which a case is susceptible should be offered, and secondary evidence, which is merely substitutionary in its nature, should not be received so long as original evidence is attainable. Moreover, a party in whose power a deed has been, should give satisfactory evidence of its loss or destruction before secondary evidence can be

properly admitted. If, however, it be shown, as in the present case, that the production of primary evidence is *out of the party's power*, secondary evidence is admissible.

Held, that the doctrine of implied revocation can only be legitimately inferred regarding a lost or missing instrument, which has always remained in the power of the party making it; that, consequently, both from the delivery of the deed from C to his wife B, and also from the object of the deed, revocation by C in the present case is not to be inferred.

Held, that the absence of the original deed, or its suppression by B, or her temporary action in opposition to it, cannot extinguish the power created by her husband C.

Held, that the evidence of witnesses, not named in the deed, is not necessarily inadmissible; and that, with reference to the lapse of thirty-five years from the date of the deed, to the presumption of the death of the witnesses to the deed, as asserted by plaintiff and not rebutted by defendant, to the formal registration of the deed, two years before C's death, in repetition of a similar power previously registered, and to the legal efficacy of a verbal power, the grant of the power by C is proved.

Held, that the delivery of A by his natural father, jointly with his wife, in his life-time, to B as her adopted son, is proved; and that the question of impurity said to attach to the giving of A by his natural mother, on the day following her husband's death, cannot, in this case, properly be raised.

Admitting plaintiff to have been of the age of twelve years at the time he was given in adoption, held, that he being a brahmin, and the nephew of his adopting father, the initiatory ceremony of investiture not having been previously performed, his adoption was valid.

Held, that by the death of D, the natural born son of C, without issue, A is legally, under the deed of permission, entitled to take his estate as against E, the widow of D.

Held, that the deed of permission said to have been executed by D in favour of E, and the adoption of defendant by E, under the power alleged to have been granted by her husband D, are not proved

229

3. Plaintiff obtained a decree against a Hindoo widow, his co-sharer, for her share of the Government revenue, which he had been compelled to pay, in order to save the joint estate from sale. On proceeding to execute the decree by sale of the widow's share, he found that she had exercised a right of adoption she possessed, and had passed the property to her adopted son. The judge refused to allow him to execute the decree against the minor's share, and he, therefore, brought a suit to have the minor declared liable for his mother's debt.

Held, *first*, that the suit will lie; *second*, that if the property had continued in the widow's hands, it would have been liable to sale for a debt of this description; *third*, that an adopted son is liable for debts contracted by the widow as proprietor of the estate, when such debts are contracted under necessity and for the benefit of the estate

515

4. Held, that the validity of the permission to adopt, alleged to have been executed by Rajah Gobindhunder in favour of his wife Shiveasuree Debea, was by the pleadings in this case put in issue; but that, on the authenticity and genuineness of that deed, as well as on the validity

of the subsequent adoption of Gobindnath Roy, no clear and distinct adjudication has been pronounced.

Held, that no words occur in the principal sudder ameen's decision, sufficiently strong and explicit to allow of the Court's coming to the conclusion, that a waiver of the question of the validity of Gobindnath's adoption had been made by the vakeels of the defendants in this case; and that, although it was competent to vakeels in court to waive any point pleaded by them, if they considered it for the benefit of their client so to do, still such a waiver, especially when it is the abandonment of a written plea, must be clear and distinct, beyond a possibility of doubt.

Held, that a valid regular judgment in this country upon the *status* of an alleged adopted son is a judgment *in rem*, and as such conclusive and final against all the world; and that a summary adjudication of the same nature, though not conclusive, is *prima facie* proof of the fact adjudicated sufficient to throw the burden of disproving the same on the opposite party.

Held, also, that the proceedings of the judge of Rajshahye, dated 20th June 1837, or 9th Assar 1244, did not refer to the adoption of Gobindnath Roy ten years after its date, but only to the permission to adopt, alleged to have been executed by Rajah Gobindchunder, and, consequently, it was in no sense a judgment upon the *status* of Gobindnath Roy.

Cases in appeal remanded to the judge of Rajshahye, for re-investigation by him

549

5. The adoption, by one of the widows, of a son, who died in her life-time, interposed no other heirs between plaintiff and the widows

944

6. The relatives of an adoptive mother inherit the property of her adopted son, just as they would have succeeded to a natural born son

1091

7. Held, further, that the adoption of a brother's eldest son by another brother's widow would, under Hindoo law, be invalid

1556

See Reversioners, No. 8.

Ancestral Property.

Held, that the consent of nephews to the sale by the uncle of his share of ancestral property is requisite neither according to the Mitakshara nor to the Hindoo law as current in Mithila. The consent of sons and grandsons is alone necessary to the sale, by the father, of ancestral property. The principle of the distinction, as stated in the Mitakshara, is, that a son has an inchoate right in the possession of his father from the time of his birth, whereas a nephew has no right at all in the ancestral property in the possession of his uncle, until after the death of the latter

1314

Endowment.

Held, in a suit where it was pleaded that certain lands, not sued for, were set apart for the purposes of *debsheba*, and that plea was not met by the opposite side, the latter, holding possession under a will judicially set aside, but on the plea that the lands held by him were *debsheba*, must, as in wrongful possession, account for meane profits.

Held also, that a deduction should be made in plaintiff's claim on account of sums spent in necessary repairs, &c., of buildings for the maintenance of the *debsheba* .. 1061

Family Usage.

Held, that when parties agreed to a decision according to the Mithila law, the specific authorities of that law, and not those of the Mitakshara, should be cited to support a bywustha .. 294

Joint Family.

1. Where two brothers, A and B, joint possessors, made over to C possession of certain lands on consideration of his paying off their debt to D, it was not competent to C, or to B's heirs, under the circumstances of the case, to hold A's widow answerable to a further extent than one-half of the liabilities incurred by A and B, nor to deprive her of her share in the lands on account of liabilities created by B himself over and above the joint act of himself and brother .. 54

2. Order of lower court upheld, which confirmed widow and daughter of deceased in possession of his property, lawfully inherited by them, against a claim which was in no way substantiated of a cousin of deceased, who averred joint possession with him during his life-time, and the inability by law and family custom of the wife and daughter to inherit joint property .. 487

3. Held, that, as the defendant had failed to prove the special plea, that the property in dispute had been purchased from his own means, and as the deed of partition among the members of the family was fraudulent, the property must be considered as part of the ancestral estate, and liable to follow the incidents of such property; and as the deed of conditional sale was satisfactorily proved, the Court, in reversal of the decision of the principal sudder ameen, decreed possession to the appellant .. 500

4. A mortgaged property to B and C as security for a loan. C, in whose name the mortgage bond was drawn up, made over all his property in gift to his wife J, who claimed the whole of the debt due by A. B instituted a suit to establish his right to half the debt. This suit was amicably settled, B's right being admitted. J then sued the heirs of A for the debt, and this suit was also amicably adjusted, they giving a fresh bond, and she giving a receipt in full for the previous debt.

B now sues to set aside these arrangements as collusive, and to recover the portion of the debt due to him. J admitted his right, but pleaded that the whole debt had been liquidated by the heirs of A, who had paid half to her and half to B, and had received their joint receipt. The heirs of A pleaded to the same effect, and filed the receipt, which has been declared spurious by the lower courts. Held, that, as the heirs of A had evidently colluded with J to defraud B, they, as well as J, must be held liable for the debt, and the mortgaged property would also be liable for sale .. 531

5. In a suit for arrears of rent of certain farmed property in a joint family of five brothers, where the plaintiff alleged the sale by one brother of his share, and the lease of the property by the other four to two omlah of the family, one brother being security for the farmers,—

Held, on the evidence and probabilities, that the alleged sale of the share of one brother was not proved, neither as to the averred reason of it or otherwise.

Held also, that the alleged lease was not proved to be a real one to real farmers, and that, as these averments formed the basis of plaintiff's case and title to sue, his claim could not be admitted. Appeal decreed. . . 732

6. Held that, in a Hindoo family, when one of the members claims separate possession, it is incumbent on him to prove such plea; and in the present case, as the plaintiffs' vendors did not deny their purchase, the judge was right in requiring defendants to prove their special plea 857

7. In a suit governed by the Mithila law between the widow of a Hindoo and his brothers, in which the former alleged the separation of her husband from the rest of his family, and the latter denied it, held that a deed of partition was not necessary to prove separation. According to the Mitakshara, it may be proved either by evidence of kinsmen, by record of the partition, or by separate transaction of affairs.

A previous decision, that the estate was *ijmalce*, in a case to which the widow was not a party, held not to be entitled to the weight which would otherwise have been allowed to it, inasmuch as there appeared to have been but a slight contest in the case, and the point had not been thoroughly investigated.

Plaintiff's admission, that her husband had executed certain deeds of gift in favour of his grandson, held not to bar her claim, as these deeds had been set aside by a decree of court . . . 858

8. In a suit to recover property from the heirs of a judgment debtor, it was pleaded by one of the heirs, that the property he held was self-acquired from funds which came to him by a deed of gift of her *streedhun* from his mother, and was not inherited from his father.

The lower court held that the heir referred to did not inherit, but was in possession of his father's property, and that there was no proof the purchase was from the self-acquired property. Further, that the precedent of this Court, of the 9th June 1847, ruled that, although, even a son did not inherit his father's property, he was still liable for his debts.

The heir who appeals does so on the ground that, as the lower court held that he did not inherit, he could not be responsible.

Held, that the ordinary rule of Hindoo law being that the natural state of a Hindoo family is that of union and of joint property among sons, and appellant, having raised the above special plea, was bound to prove it, and failed to do so.

Held also, that the *Sudder Dewanny Adawlut* Decision of 9th June 1847 contains no ruling, the appeal having been dismissed without reference at all to any point in the case . . . 862

9. Plaintiff, the mother of one of five brothers of an undivided Hindoo family, sues to reverse the sale in execution of a 10 annas share of certain property, which was brought to sale in satisfaction of a decree against the brothers of Mirtunjoy, on the ground that it was Mirtunjoy's self-acquired property. The lower court dismissed her claim.

Held in special appeal, that the mere fact of the registration of one brother's name in the collector's books as the owner of the property, is not sufficient to rebut the presumption as to the property being joint, arising from the fact of the family being undivided; that the purchase of property and its registration in the name of one brother of a Hindoo

undivided family are very common, and such transactions are considered *benamies*; and it remains for that son claiming the whole of the property to prove that he alone is entitled to the legal and beneficial interest in the property, and this he must do by showing that the money with which the estate was purchased was his; and, as in the present case, the plaintiff was unable to show that the estate was purchased with the money of her son in whose name that property was registered, her suit was necessarily unsuccessful.

Held also, that a person claiming under a special title cannot, in the same suit at least, on that failing, fall back upon his right under the general rule of Hindoo law.

The special appeal dismissed, with costs

1132

10. Held, that in a joint Hindoo family the presumption is that property acquired by its members is so from the joint funds; and where it is pleaded to be otherwise and self-acquired, the burden of proof is on the party raising this plea.

Held also, that the name of one sharer of a joint undivided Hindoo family appearing in receipts and other papers relating to the management of the property is not a sufficient test, as frequently the name of one sharer is used, while the interests and funds remain joint. The material test is the quarter from whence the money comes

1481

Inheritance.

1. It not being shown that appellant's documents, a kubala and wusecutnamah, were genuine and authentic deeds, but reason being rather to the contrary, decree of lower court upheld, awarding to plaintiff possession of her lands as deceased's heir, with costs against appellant

395

2. Held, that a certain *neem puttro*, alleged to exclude certain parties from inheritance, was not proved.

Held, that plaintiffs, as brother's sons, were heirs by Hindoo law in preference to a defendant, a brother's son's son

567

3. Held that, in a suit in which the main prayer of the plaintiffs is for possession by right of inheritance, it is not competent to the Court, on that claim failing, to enter into a consideration of points which were only auxiliary to the main one, and which were raised by plaintiffs only in order to remove obstacles to their immediate possession.

So much of the decision of the lower court, as declares the deeds of gift and adoption invalid, reversed, and the special appeal dismissed, with costs

633

4. Plaintiff sued for a share of ancestral property on a right by inheritance; and defendant pleaded that the whole property devolved on him by right of primogeniture, according to family custom.

Held that, as plaintiff pleaded long possession, under his right of inheritance, and dispossession, he should first prove these pleas; but as plaintiff in no way proved these points, plaintiff's (appellant's) appeal was dismissed

671

5. Plaintiffs, as nearest male heirs of Jugudanund Tagore, sued to obtain possession of his property within 12 years from the death of his widow Dasoomonee, who survived him for more than fifty years, urging that, according to family custom, ancestral property, on the death of a widow, reverted to the heirs of the male line, to the exclusion of the female line.

Defendant, being a great-grandson of Jugudanund's daughter, pleaded limitation, and claimed the property under a special gift made by Jugudanund to his (defendant's) grandfather, Sreekanth, who was nominated by Jugudanund to be a mohunt, and, on being installed, got possession of the property as appertaining to his office under a hibanamah from Dasoomonee, the widow of Jugudanund, which she executed in conformity with the instructions of her deceased husband.

Held that, unless the defendant could prove his gift from Jugudanund and his allegation that Dasoomonee was not in possession of the property as a Hindoo widow, but merely as a trustee for Sreekanth, the plaintiff's suit, within twelve years from the death of Dasoomonee, was in time, they being heirs of Jugudanund, and as such having only a contingent right during the life-time of the widow, and being incompetent to sue for possession till after her death.

Held that, notwithstanding the presumption arising from long possession, as the defendant is unable to prove his allegation of gift, and his possession derived from Dasoomonee is not incompatible with her possession as a Hindoo widow, the property must, on her death, pass to the plaintiffs, the nearest male heirs

6. Defendant not having fulfilled his engagement to pay a certain sum to deceased's widow, on her relinquishing claim to certain of deceased's property, lower court rightly decreed in her favour, excepting as to a piece of land to which her title was not proven

7. As the deceased during life held possession, his heir could not be ousted, on the ground that, under Hindoo law, the disease under which deceased had laboured debarred him from inheriting property

8. Plaintiff, a widow, sued as heir to her deceased husband for possession of certain property (alleging dispossession by defendant), and for the setting aside of the alleged adoption, by him, of defendant's, her husband's cousin's son and an alleged will of plaintiff's husband, constituting defendant executor. Plaintiff also sued for cash, furniture, and bond debts.

Defendant pleaded that he never dispossessed plaintiff; that he held possession of the property in suit as executor of plaintiff's husband and guardian of his own son, being plaintiff's adopted son; that plaintiff had acknowledged defendant's position and the will and adoption, and had received a certain mehal by way of gift from defendant, and, in the deed as to it also, acknowledged the same facts.

The lower court thought that the will and adoption were not proved, and that the real deed of gift of the mehal above referred to did not recognise either; further, that the possession was really plaintiff's, although defendant, as manager for her, a purda-nusheen woman, could easily make it appear that he was in possession under the will and adoption pleaded by him in this case. The principal sudder ameen disallowed the plaintiff's claim as to cash and furniture, decreeing the rest of it, and proceeded to have defendant tried for forgery.

The fact of the execution of the will, and the reality of the adoption; as also whether defendant's witnesses had been duly examined; whether the whole costs had been properly charged to defendant; and, lastly, whether there was any ground for the defendant being proceeded against for forgery, were the matters of appeal to this Court.

681

800

933

Held, that as, by the law of inheritance, plaintiff is the rightful heir of her husband, and can only be debarred by special causes legally operating to debar, and defendant pleads such special causes in the will and adoption, the burden of proving them from his own case falls on him.

Held, on the evidence produced by defendant and the probabilities of the case, that the will and adoption and deed of gift pleaded by defendant were not duly proved, although the position of defendant as manager gave him full means to appear as if in real possession as executor of plaintiff's husband and guardian of the adopted son.

Held also, that, admitting assent of plaintiff is inferrible, assent of a Hindoo woman, situated as plaintiff was, and in the face of clear evidence of fraud on the part of defendant, could not prove the *bonâ fide* character of the deeds and transactions pleaded by defendant.

Held also, that, as the appeal opened out the whole record to the Court, it was open to it to look to plaintiff's evidence, and although some of the witnesses were by their own showing tainted with fraud, the Court could accept so much of their evidence as was independently corroborated.

Held further, that, by the witnesses on plaintiff's side who were not tainted in any way, it was proved that plaintiff's husband was speechless for seven days before he died, and that no real will or adoption was made.

Held further, that the defendant had full opportunity of examining the witnesses required by him; and, judging especially from the evidence given by one examined by this Court, where he was present, defendant could not have improved his case by their testimony.

Held also, that for about four years, after plaintiff's husband's death, she was a consenting party to the defendant's fraud, and received for that assent a mehal from defendant in gift.

Held, that in such a case, if plaintiff had come into court to enforce a fraudulent and therefore illegal engagement, the Court would have held that the title of the party in possession, and not plaintiff's, must prevail. But as plaintiff sued to avoid the fraud, and as a helpless Hindoo purda-nusheen widow advantage was taken of such a situation in obtaining her assent to the fraud, and thus, as plaintiff was not *in pari delicto*, she is entitled to be restored to the position which she lost by the undue pressure put upon her by defendant.

Held, that there was no ground to interfere with the principal sudder ameen's orders as to the trial of the defendant under Act I. of 1848

1379

9. In a suit for possession of a mouroosee mokudumee tenure in Cuttack by two plaintiffs, the one coming in on a title of inheritance, and the other on adoption, the lower court held that the first plaintiff's suit was barred by limitation, and that the second plaintiff had not proved the adoption under which he claimed. The lower court, therefore, dismissed their suit.

On the appeal of the first plaintiff, it was held that his suit was barred by limitation, the fact being proved by a previous deposition of plaintiff himself, and that the question of the adoption of the second plaintiff and the nature of the case required the principal sudder ameen to go into the case, to some degree before deciding on its being barred by limitation as to the first plaintiff. *Held* also, that the second plaintiff did not prove the adoption he pleaded.

Held further, that the adoption of a brother's eldest son by another brother's widow would, under Hindoo law, be invalid ... 1556

10. Held, that the hibanamah propounded by the defendants was spurious, and that plaintiffs were entitled to the share in the ancestral property which they claimed .. 1659

Liability.

Held, that as the debt out of which the present suit has arisen was a personal one of Kunukmonee, those persons who succeeded to her property and those only are liable for her debts, and that to the extent of the property acquired from the deceased. In order, therefore, to determine whether the defendant, Tarasoonderoe Debea, the step-daughter of Kunukmonee, is liable or not, it is necessary to ascertain whether she succeeded by will, or otherwise, to any property, for, by inheritance, she could not, under Hindoo law, succeed her stepmother.

As this point has not been completely and clearly ascertained, the case is remanded, in order that certain inquiries may be made and a decision passed in conformity with the facts as they may eventually be found to be .. 657

- See* Widow, No. 9.
- „ Reversioners, No. 8.
- „ Minority.
- „ Widow, No. 6.

Maintenance.

Decision of the lower court upheld, as the words of the will, which declared appellant entitled to receive the maintenance while in the family, did not provide for a money equivalent to be paid to her after she had left the family .. 457

Minority.

Plea of limitation held not to apply, as the majority of plaintiff must be reckoned from the end of his eighteenth year, he suing as zemindar in possession of one portion of an estate for recovery of another portion .. 442

- See* Guardian, No. 2.

Mortgage.

1. The lender in good faith lent the money to save the widow's estate from sale, on security of a bond and mortgage. The present possessor, though not succeeding as her heir, is liable to the extent of the security, if the widow acted for the benefit of the estate and under necessity. Remanded to try this point .. 207

2. By the Mitakshara law, alienation without consent of heirs being unlawful but under necessity, a transfer by mortgage, made to clear off old debts and pay for a marriage, was held to have been made under sufficient urgent cause .. 376

3. Where a mortgage had been effected by a Hindoo father in a district governed by the Mitakshara law, for the purpose of saving the estate from sale for arrears of revenue, held, on the precedent of the case of Hunoomanpersad Panday, Privy Council Reports, Vol. VI., p. 393, that, as the mortgagee appeared to have acted in good faith and had

lent the money to prevent a former mortgage from being foreclosed, his mortgage was a good and valid one. It is a mistake to suppose that the dicta in the case of Hunoomanpersad Panday apply only to alienations effected by guardians of minors. They lay down the general principles by which the courts are to be guided, in dealing with suits in which it is sought to set aside alienations made by persons having a limited or qualified power over the estates they have alienated.

These are, that the power of alienating can only be exercised rightly in case of need, or for the benefit of the estate, but, where the charge is one that a prudent owner would make in order to benefit the estate, the *bonâ fide* lender is not affected by the precedent mismanagement of the estate. The actual pressure on the estate, the danger to be averted, or the benefit to be conferred upon it in the particular instance, is the thing to be regarded. If the lender inquires into the necessity for the loan and acts honestly, satisfying himself that the manager is acting in the particular instance for the benefit of the estate, the real existence of a sufficient necessity is not a condition precedent to the validity of his charge on the estate, nor is he bound to see to the application of the money

.. 1643

Reversioners.

1. Held by the majority of the Court, that suits by reversionary heirs, though their interest is not vested, but only contingent, to restrain waste or alienations in the nature of waste, by a Hindoo widow, will lie.

Held also, in accordance with the precedent of *Nundlal Baboo versus Bolakee Beebee*, that when alienations by a Hindoo widow, utterly subversive of the rights of the heirs in reversion, are proved, and it is shown that, but for the interference of the courts, ultimate loss to the heirs who may succeed eventually will ensue from conduct of the tenant in tail in possession of the property, this Court, with a view of remedying, or rather of preventing, such loss, will step in and appoint a receiver to take charge of the estate. The reversionary heir may be the receiver, but his appointment as such is not by virtue of his reversionary right, but on a consideration of what is most for the benefit of the estate.

Held, moreover, that when a stranger is appointed as receiver, security should be demanded, but when a reversioner is appointed, his interest in the retention of the management and in the welfare of the property may stand in the place of security, the more especially as it is always in the power of the widow to move the Court, either for the appointment of a fresh receiver or for the demand of security, should the rents and profits be not regularly paid over as directed.

Special appeals dismissed, with costs

210

2. Held, that as the Hindoo law only contemplates the illegality of a father's alienation without a son's consent, in certain cases, a suit by a nephew against his uncle's alienation was wrong, and, further, was not referred to in the *bywustha* relied on

294

3. It not being proved that the mother and heir of deceased lent her support to a will proved to be spurious, nor that she had forfeited her rights through waste, the lower court was not justified in excluding her from possession of his estate, and awarding maintenance only

436

4. With reference to the case, at page 567 of the Decisions of 1859, held that, as plaintiffs' father had no rights while the widow was alive, and the sale in execution of a decree of his rights took place in her life-time, the sale did not affect plaintiffs' right, which accrued only after the widow's death, and so plaintiffs' right could not, as contended, have been extinguished by such sale .. 570

5. Held, that none but the immediate reversioner is entitled to sue to interfere with the acts of a Hindoo widow in possession.

Held also, that a petition presented by the immediate reversioner, when the suit was pending in special appeal, waiving his rights in favour of the plaintiffs, in order to cure the defect of parties, could not be admitted at that stage .. 620

6. Suit dismissed as premature, the plaintiffs not being the immediate reversioners and being unable to show collusion on the part of more immediate heirs than themselves .. 891

7. The plaintiff as reversionary heir was entitled to possession, to prevent waste, as trustee for the widows during their life .. 944

8. Held, in accordance with former precedents of this Court, that it is competent to the guardian of a minor, the first reversioner after the death of the two intervening life-tenants, the widow and daughter of the former owner of the estate, notwithstanding that the minor's right is only contingent on his surviving them, and may, therefore, never vest, to sue to remove obstructions out of the way of the first reversioner, and so to enable him, on the death of the successive tenants for life, if he survives them, immediately to enter on possession.

Held also, that in a suit of this nature no application of the statute of limitations can be made. The guardian need not have sued, but have left it to the minor to sue on his estate vesting; and, in this case, the minor would have been allowed twelve years, from the date of his estate vesting, for the prosecution of his claim.

Held that, on the evidence, plaintiff has been unable to show that the relationship between defendant's natural mother Anundmoyee, and his adopting father Biressur Purdhan, was that of first cousins once removed; but defendants have shown on the deposition of respectable persons that the relationship was more remote and one allowing of no objection, on the score of nearness, to the adoption, which, as to the act itself and the ceremonies necessary for its performance, was rightly performed.

Appeal of plaintiff decreed, with costs, and the statute of limitations declared inapplicable to the present suit, and defendant's appeal on the merits decreed. Costs of both courts payable by plaintiff .. 1623.

Succession.

Petitioner objects to the order of the judge recognising one Grishohunder Lahoree as representative of one Sarodapersad, urging that she, as one of the wives of the late Kaleekant Lahoree, holds a permission to adopt a son in case of failure of direct heirs on the part of his (Kaleekant's) adopted son Sarodapersad. As this contingency has resulted, she, though she has not yet adopted a son, is in the position of a woman *enceinte*, and is, as mother of a son about to be born, entitled to succeed to the property left by Kaleekant Lahoree.

Held, that the claim of the petitioner depends entirely on the genuineness of the deed propounded by her. Independently of that deed, Grishchunder, as the nephew of Kaleekant Lahoree and cousin of Sarodapersad, is the nearest natural heir under Hindoo law, and the judge was quite right in preferring the natural heir, leaving the party preferring a title under a questioned deed to bring her suit in the civil court to establish her right .. 1687

Widow.

1. Held, that though, strictly speaking, a Hindoo widow has no general power to execute a *hiba-bil-ewuz*, which is more in the nature of a sale than a gift, still, in the present case, which is a transaction between the grandmother and her grandson, the Court consider the transaction in the light of a gift; and, consequently, it was quite competent to the grandmother, her own daughter or her grandson's mother not being alive, to transfer the property to her grandson, so as to accelerate his succession and to place him in a position at once to assert his right to his grandfather's property. Special appeal rejected, with costs. 166

2. Suit to cancel deeds of lease and assignment by a widow, dismissed in affirmation of the judgment of the lower court. Held, that as the widow was left "mistress" of the property for life, the deeds could not be questioned in her life-time .. 162

3. The subject matter of this suit is the validity of a talookdarce pottah granted by the mother of plaintiff, a Hindoo widow, before she had adopted plaintiff. Both the lower courts affirmed the pottah and dismissed the suit; and a special appeal having been admitted on two grounds, it is held, with reference to the first, that the zillah judge had not relieved defendant, the lessee, from submitting proof of the circumstances of necessity that have been held to justify the grant of the talook by the plaintiff's mother; and, with respect to the second, that the danger of losing the whole estate by a sale for arrears of revenue, and the limited and encumbered resources of the widow, which together were held to justify the widow in seeking relief by the creation of the defendants' talook, furnish grounds of legal necessity within the contemplation of the law .. 421

4. It not being proved that the mother and heir of deceased lent her support to a will proved to be spurious, nor that she had forfeited her rights through waste, the lower court was not justified in excluding her from possession of his estate, and awarding maintenance only .. 436

5. Held, that no legal necessity was made out to admit of the childless Hindoo widow in this case creating a putnee talook and appropriating the premium derived from assigning, in putnee, the property, in which she had but a restricted life-interest .. 567

6. In a suit to set aside alienations by a Hindoo widow, limitation runs from her death, previous to which the husband's heirs have merely a contingent interest in the property .. 631

7. Case remanded to the principal sudder ameen, to determine why the suit instituted by the plaintiff's grandmother and her pilgrimage to Benares were such acts of necessity as to allow of her, a Hindoo widow's, selling the ancestral property; and to ascertain whether, as alleged by plaintiffs, the profits of the property were not sufficient to

- meet the expenses of the suit and pilgrimage, without rendering alienation of the property necessary 1164
8. Suit remanded, as the judge had misinterpreted the purport of a document filed by the defendants, which he held to be a simple receipt for a share of the ancestral property, whereas it contained terms amounting to a relinquishment of portion of that property, and as the party executing the document is a Hindoo widow, and had no power to alienate any part of the ancestral property to the injury of the reversioners 1186
9. Held that, as the respondent had given up all title to monies due to her husband in favor of the appellant, his other wife, she could not be held liable equally with appellant for her husband's debts. The order of the lower court, dismissing the appellant's claim to recover money from defendant as jointly liable with her for their husbands' debts, confirmed 1196
10. Special appellant, a purchaser from a Hindoo widow, being unable to show that there was a necessity for the sale of the property to liquidate the debt, held that there were no grounds for modifying the order of the lower court 1515

INSOLVENCY.

Held, that under Section 11, Regulation II. of 1806, the restricted insolvent law of the Mofussil, the property to be mentioned in the statement on oath must be immediately available in execution of the decree standing unsatisfied against the debtor; and, to be available in execution, it must belong to and be in the possession of the insolvent either actually or constructively at the time of his application; that, consequently, property not in possession or simply in expectancy is not within the purview of the law, and its omission from the statement is no fraud against the decreeholders.

Held, moreover, that, under the same law, creditors are entitled to bring to sale any property of which the debtor may become *subsequently* possessed. Any property, therefore, either in reversion or in remainder, or in the possession of others by wrongous acts on their part, when reduced to the possession of the debtor, either by operation of law or by the assistance of the courts, becomes at once available in satisfaction of the debts outstanding against the insolvent. Case remitted to the court of first instance for investigation on the merits 1463

See Action, Cause of, No. 7.

INTEREST.

1. Held that, in adjusting an account on a bond, the course adopted by the moonsiff, in crediting the amount of profits from the mortgaged property first to the liquidation of the interest, was correct 497
2. Under the circumstances of the case, interest was disallowed to the decreeholder upon a sum held in deposit on his account, but not paid, pending result of an appeal of the party cast, for the period of pendency of the appeal. The decreeholder did not offer to draw the sum on security for eventual fulfilment of orders on the appeal. As the money was available, there was no risk lest it should not be paid, and no interest could, therefore, be allowed to compensate for such a risk 560

3. When there is no agreement, interest can only run from the date of a written demand ..	711
4. Amendment of lower court's decree with regard to interest ..	743
5. Interest on costs is only chargeable from the date of decree ..	1111
6. Interest on a claim for arrears of rent not allowed, where no written demand for such interest has been made ..	1172
7. Held, that, as a general rule, that laid down by the Court is the correct mode of bringing sums received to account, viz. that out of the amount realised, that due for interest should first be credited to that head, and the remainder, if there be any, should then be credited to principal. As, however, in the present instance that course has not been followed, and nothing but interest remains due, it would be unjust to the debtor to allow the decreeholder to vary his mode of calculation and to convert that which is itself interest, and consequently should bear no interest, into a principal bearing the usual interest of 12 per cent.	
The order of the lower court reversed, with directions to proceed in execution as above suggested ..	1211
8. Held, that where the rejection of a summary application for surplus sale proceeds is the act of a competent court of justice, interest can only be allowed from the date of the decision in the applicant's favor in a regular suit ..	1257
9. Where a plaintiff, to save a joint estate, had paid up arrears due by his co-sharers, and sued them for the sums so paid, it was held that he was entitled to receive interest on such payments though he might not have made any personal demand on them for repayment previous to the institution of the suit.	
Objection as to costs not brought forward in the lower appellate court not entertained in special appeal ..	1635

IRRIGATION.

As the oral evidence produced by the parties showed that the water-course, the subject of this suit, had been excavated and kept in repair by the former zemindars of Muhalat Khurukpore, and the defendants were unable to prove any right to, or previous use of, the water for irrigating their lands, the decision of the lower court, directing that certain channels cut by the defendants be closed, was confirmed.

Held, that a party who had purchased the property after the act of trespass from the wrong-doers and was in possession when the suit was brought, though rightly made a party to the suit, could not be made liable for the plaintiff's costs, merely because he opposed the plaintiff's claim, and that, as he was dragged into suit by the wrong-doing of his predecessor and co-defendants, his costs should be charged to them .. 317

JOINT PROPERTY.

See Hindoo Law.

JULKUR.

Held, that the bed of a navigable river, that is, of a river in which the tide ebbs and flows, is not, by Regulation law, Regulation II. of 1825, which is declaratory of the common law of this country, the

property of any individual, but of the public, and, consequently, the right of fishery in such a river is not private property, but that right is a right common to every person. If, therefore, individuals, as in the present case, claim an exclusive right in navigable rivers, they must show that it has been acquired either by grant or by prescription, which is evidence of a grant; and until that be shown the presumption is strong against the claim advanced.

Held, that the claims put forward by the parties in the present case are in derogation of public right, and in the nature of special titles; and as the presumption of law against both of them and in favor of the right of the public is strong, it is necessary to inquire into the evidence produced by both parties, to show that they are entitled to what they now claim.

Held, that the evidence produced by both parties is quite insufficient to prove the right to exclusive possession claimed by them.

The plaintiff's claim dismissed in reversal of the lower court's decision, and each party to be liable for his own costs in both courts ... 1357

JURISDICTION.

1. Order of the judge, dated 7th December 1858, cancelled, inasmuch as it was not in consonance with the order of the Court, dated 9th October 1858, directing the immediate release of the property belonging to petitioner from attachment ... 95

2. Authority having been given by the Sudder Court to a particular zillah court to try a cause respecting landed property, alleged by one party to be in one district, and by the other in another, no question of jurisdiction can arise, and lower court ought not to dismiss suit on the ground that the property appears, by thakbust map, to be in another district ... 674

3. Held by the majority of the Court, in accordance with recent rulings, that it is not competent to the civil court of Dinapore to hear a suit for the reversal of orders passed by the magisterial authorities of Bhaugulpore, one consequently in which an issue is raised, involving an inquiry regarding a district other than that over which the judge of Dinapore has jurisdiction, without first obtaining the permission of the Sudder Dewanny Adawlut.

Case remanded accordingly, in order that the course suggested may be followed by judge of Dinapore. ... 991

4. When a party sued to recover possession of property alleged to be situated in the zillahs of Sylhet, Dacca, and Tipperah, and instituted the suit in zillah Sylhet, on the ground that the bulk of the property was situated in that district, and the principal sudder ameen of that zillah obtained permission from the Sudder Dewanny Adawlut to try the suit, but afterwards, in the course of the proceedings, discovered that the bulk of the property was situated in zillah Dacca, in which district the defendants resided; and consequently nonsuited the case. It was held, that the principal sudder ameen's order was correct, as plaintiff must have been aware in what district the bulk of the property was situated, but to serve his own purpose had filed the suit in zillah Sylhet ... 1107

5. Held, that moonsiffs are not authorised to try cases of resumption to which Government is a party. Section 4, Act XXVI. of 1852 limits

their jurisdiction to cases of resumption under Section 30, Regulation II. of 1819. The proceedings therefore in the case before the Court have been done without jurisdiction, and are null and void.

The special appeal decreed, with costs

1278

6. Held, that it is not competent to the principal sudder ameen of one district to sell real property situated in another district; but if a decree-holder desire to have property, situated in a district other than that in which the judgment was pronounced, brought to sale in execution, he must proceed under Act XXXIII. of 1852

1435

7. Held also, that, on the united grounds of principle and convenience, it is the duty of a court to follow the decisions previously passed by a concurrent court on the same subject matter, and between the same parties, and to leave it to the appellate court to rectify any error which may have been committed in the original decision

1632

8. Case was remanded to court of first instance, but wrongly retained by the lower appellate court, and then struck off for default. Re-trial directed

1682

9. Held by a majority of the Court, that the penalties imposed by Section 66, Regulation VIII. 1793, on parties illegally assuming to themselves the powers of the civil and criminal courts, can only be inflicted on the suit or complaint of the party injured, and cannot be initiated by orders of the judge or other authority

1694

LAND, POSSESSION OF.

1. In a suit for recovery of land, plaintiffs, appellants, having upon the evidence failed to prove their case, the order of dismissal made in lower court was affirmed in appeal

3

2. In a suit by plaintiffs to recover possession of lakhiraj land from which, in consequence of the zemindars' entering into an engagement with their tenant, they had been summarily ejected, held, in conformity with other cases, that it was not necessary to try the validity of the plaintiffs' tenure

20

3. Lower court's order confirmed, awarding recovery of possession of lands to plaintiff, illegally occupied by defendants under an Act IV. decree. As both parties claimed on the basis of lease from A's heir, the lower courts were to determine which of their allegations of fact was true, and were not bound to inquire into A's rights

111

4. Appeal dismissed, it being proved that the lands claimed by plaintiff formed part of the area measured and given up to plaintiff by the revenue authorities, under orders of the special commissioner. New pleas not urged by the defendant in the court below, and not brought forward in the pleadings, were rejected

122

5. Plaintiff sought to recover possession of a share of certain putnees and an indigo concern. As the evidence adduced by him to prove that he had purchased the property, had been in possession, and had been ousted, was considered insufficient, his claim was rejected, and the order of the lower court reversed

184

6. Plaintiff sued for possession of certain land, of which, contrary to an engagement entered into with them, he had been dispossessed by defendants, and for damages and interest on the same.

Defendants pleaded that the plaintiff had resigned the property voluntarily, and consequently they are not liable to him for any

damages in the matter of short collections made previous to his resignation.

The lower court gave plaintiff a decree for possession only. On appeal, the judge gave plaintiff a decree as sought for by him.

Held, in special appeal, that the real issue in this case is, whether plaintiff voluntarily resigned the lease or was dispossessed of it. If the former, he will have no action against the defendants; if the latter, they will be justly liable for damages. This issue not having been tried below, the case is remitted to the first court for re-investigation 272

7. Decision of the lower court confirmed, as the evidence produced by the plaintiff was considered insufficient to prove his right to, and previous possession of, the tract of reclaimed jungle land in dispute 334

8. Two suits have been instituted, one by A for possession of certain lands decreed to B under Act IV. of 1840, another by B for a reversal of a survey proceeding drawn up subsequently to the decision under Act IV. of 1840, including the lands within A's estate.

The principal sudder ameen, looking upon B's case first, determined that he had not proved that the land entered in the thakbust as belonging to A was within his estate. He, therefore, dismissed B's case, and, as a necessary consequence, decreed that instituted by A.

Held, on appeal, that as B was in possession under the order of the criminal courts acting under Act IV. of 1840, in other words, under the order of a court of competent jurisdiction, and as the order of the survey authorities was subsequent in point of date to that of the magistrate and session judge, his possession should have been upheld until A showed a title superior to his; that, consequently, A's case should have been taken up first, and B's have followed the result of it; and the principal sudder ameen in acting otherwise has erred in his mode of disposal of the cases before him.

Held, also, that evidence produced by A is totally insufficient to warrant the court's entering into any inquiry of B's title.

The decision of the lower court in A's suit is reversed, and in B's suit, also, that decision is reversed, and B is declared entitled to have the lands in dispute demarcated as belonging to turuf Telkore. The costs of both courts to be borne by A 350

9. Held, that thakh of an ameen is only a preliminary proceeding, and can therefore form no basis from which to calculate the date of the *quasi* judicial orders passed by the survey officers. Those orders must date only from the date on which they are passed.

Held also, that, on the united grounds of principle and convenience, it is the duty of a court to follow the decisions previously passed by a concurrent court on the same subject matter, and between the same parties, and to leave it to the appellate court to rectify any error which may have been committed in the original decision.

Held, moreover, that it is incumbent on parties, questioning the title of other parties in possession under the order of the criminal courts acting with jurisdiction, and therefore competent, to prove their own title to the lands claimed before they can put the parties in possession to the proof of their title.

Application for review rejected in two cases, with costs 1632

10. Appeal dismissed. Where A held half share in a putnee lease, and defendants had taken possession of a portion of the estate comprised

- in it, on the ground that A and his brothers had executed a durputnee of A's shares in their (the defendants') favor, the lower court found the deed to be not genuine, and kept A in khas possession . . . 378
11. Held, that the special appellant is entitled to retain the possession awarded to him under Act IV. of 1840 until a party proves a right to possession superior to his ; and that, consequently, the decision of the judge, which has looked only to the fact of possession on the part of the plaintiff previously to the institution of the suit under Act IV. of 1840, cannot stand.
- Case remitted, in order that the judge may inquire into the plaintiff's right to possession under a mouroosee lease, as claimed by him in his plaint . . . 401
12. Suit for possession of alluvial land, on allegation of dispossession, dismissed, plaintiff having failed to make out even a *prima facie* case.
- Prayer for a local inquiry refused. Local inquiries are only admissible for the investigation of points of detail. The material facts of the case must be established in court . . . 461
13. Plaintiff sued for possession of three pieces of land, amounting to 8 beegahs 14 cottahs, as part of an estate which he had purchased at a public sale.
- Defendant Hadee Khan pleads that he holds 2 beegahs under plaintiff, but no more.
- The moonsiff gave plaintiff a decree for the amount admitted by the defendant to be in his possession.
- On appeal, the judge decreed the whole claim of plaintiff in his favor against defendant.
- Held, on special appeal, that, previously to passing a final order in the case, the judge should depute the court ameen into the mofussil with the measurement papers prepared at the time of resumption and settlement, and give a decree against special appellant for the quantity of land which may actually appear by such inquiry to be in his possession. Case remitted to the judge to act as above directed . . . 463
15. On the evidence adduced by both parties as to the disputed piece of land pertaining rightly to their respective estates, the award of the lower court, in plaintiffs' favor, was correct, and affirmed accordingly . . . 593
16. Remanded under precedent cited . . . 654
17. Certain junglebooree aymas were declared by the Sudder Court, in 1821, to have been illegally separated from talook Lalpoor, and the owners of that talook were authorised to assess them at full rates. They allowed them, however, to remain under separate number on the towjee.
- In 1829 the owners of Lalpoor partitioned that talook and other estates, but the aymas were not included in the partition. In 1833, one of these owners, the ancestor of defendant, mortgaged the estate allowed to him in the butwara. In 1841 the mortgagee obtained possession under a deed of foreclosure, and in 1847 sold the estate to the plaintiff. In 1853 plaintiff brought this suit to have it declared that he was entitled, under the Sudder Court's decree of 1821, to plaintiff's share of the aymas, which had continued, subsequent to the butwara, to be held as a joint and separate property.
- Held, that the decree did not re-incorporate the aymas with Lalpoor ; that the owners of Lalpoor, with the consent of the revenue authorities,

were competent to retain them as separate estates; that to ascertain what is included in an estate created by butwara, you must look to the butwara itself, and not beyond it: that the aymas were not, in fact, included either in the butwara, the mortgage, or the sale, and that plaintiff had failed to make out any title to them.

The express mention of one thing in a deed implies the exclusion of another not mentioned, and the word "appurtenances" will not pass landed property

780

18. Held by the whole Court, that the petitioner's claim to have the aymas considered as an appurtenance of the villages in his mortgage deed is inconsistent with his original case, that the claim on the agreement relative to the aymas was a conditional one, and that the true construction of the deed and the parties, as evidenced by their acts, are opposed to the plaintiff's present claim, which is merely an attempt to oust the defendants of the aymas in their possession under color of certain general terms used in the mortgage deed.

1521.

19. Lower court's order upheld as consistent with the facts before it

817

20. Lower court rightly decreed possession, when defendant could show no title to eject plaintiff

827.

21. Held, that from the evidence on the record, the Court sees no reason to interfere with the decision come to by the principal sudder ameen,

1st, as to the boundary line between appellant's and respondents' several properties: 2nd, as to the position of the resumed lands of Mudundangah: and 3rd, as to the amount of land contained in the admitted jote of the defendant.

Held also, that a mere tenant at will is not, under Section 4, Regulation XI. of 1825, entitled to lands formed by alluvion as an increment to the land which he holds on such a precarious tenure.

Decision of lower court affirmed, with costs.

869.

22. Suit for possession of land on the boundaries of two estates, dismissed on the evidence.

Copies of depositions taken in other cases cannot be received as evidence of the facts to which they relate, unless it is shown that the witnesses who emitted those depositions are dead, or cannot be produced.

1084.

23. Held, that where the question at issue was of alleged possession and dispossession in a case of the nature of a boundary dispute, the first issue to be decided was that, and not one of conflicting title, as had been erroneously held by the judge. The decision of the judge reversed and the special appeal decreed, with costs.

1234.

24. The ancestor of appellant (plaintiff), having been dispossessed by his zemindar of certain lands of which he was the alleged owner, subsequently acquired possession of them as tenant only of his zemindar.

The respondent (defendant) having again dispossessed him and his zemindar also, appellant (plaintiff) sued both him and his zemindar to recover his land.

The lower court dismissed the suit as barred by the statute of limitations, reckoning from the date of the first dispossession.

But the Court held that the plaintiff's right to maintain this action must depend on his proving that he was in actual possession as the zemindar's tenant when the alleged later dispossession took place, and, discrediting the evidence in the record on that point, dismissed the appeal, with costs.

1246

25. A dispute between the ryots of the plaintiffs and those of the defendants for some land, previously covered by water, was decreed by the civil court in favor of the latter. On the strength of the boundary laid down in that decree, the magistrate, it was alleged, a few months after gave the defendants possession of another piece of adjacent land.

The present suit, to reverse the magistrate's order, was dismissed by the lower court.

The Court dismissed the appeal, holding that the evidence was most untrustworthy, and that the plaintiffs' not bringing the suit till within a few days of twelve years from the date of the magistrate's order, afforded a strong presumption against their claim .. 1337

26. Where the plaintiff sued for possession of certain lands as belonging to his village, and the lower court found that he was entitled to the land, the order of the principal sudder ameen retaining in possession the defendant who claimed the lands as appertaining to another estate, and directing plaintiff to recover rent from him, was incorrect, and the order was reversed .. 1516

See Alluvion.

LAKHIRAJ.

See Rent Free Tenures.

LEASE.

1. Appeal dismissed on the evidence and probabilities of the case. Decision of the zillah court showed the seal on the pottah and receipt pleaded to have been at the command of a dependant, who abused the power it gave him. The lease was of an unusually long period, and on most favorable terms. No dispossession had formed the subject of complaint, and this suit was brought more than ten years after alleged dispossession .. 40

2. This suit was instituted to recover possession of a share of a village which had been leased to plaintiff for eight years, in consideration of a cash advance, and from which the lessor, defendant, had ousted plaintiff, on an arrear of rent being decreed to be due.

Held, that lessor, defendant, with reference to Clause 4, Section 18, Regulation VIII. of 1819, was competent to oust the lessee, and that, as a distinct provision is made in the lease, that, in the event of the dispossession of the lessor, his advance should be repaid from other sources, the lease of plaintiff was not irrevocable .. 58

3. A zemindar A first granted a mokurree lease of certain villages to B, on a written stipulation that, if B became a defaulter to the amount of three instalments of rent, it should be competent to A to cause the lease to terminate. Afterwards A granted another lease of the same villages to C, at a lower rent than the rent payable by B, transferring to C B's kuboolyut, and giving a written order on B to pay his rent to C.

C, showing that the condition of forfeiture expressed in B's kuboolyut had occurred by his default, now sues to set aside B's lease; and it is held, by the majority of the Court, in reversal of the judgment below—

First, that, provided A did not impair the right secured to B, or vary the conditions by which B's tenancy was constituted, it was competent to A, as zemindar, to confer the second lease to C, at his discretion, for the better management of his estate.

Second, that though the power to declare B's lease forfeited was not expressly assigned in C's lease, it was competent to C to exercise that power, both because the arrangement entered into by B, for securing the recovery of his rent, was legally preserved to C as representative of the lessor, and because B had, in writing, recognised that power as being vested in C.

And, *third*, that the forfeiture clause was a substantial condition of B's tenancy, fit to be enforced on the occurrence of the stipulated default

4. Review rejected.

Held, that the *ikrar* now alleged not to have been proved had not been disputed on the first appeal, and could not be so on review.

Held, also, from the facts of the case, especially as the same conditions of ouster existed in plaintiff's (*mokurureedar's*) lease from the zemindar and in the defendant's *kuboolyut* to the zemindar made over by the latter to the plaintiff, and as the zemindar had not reserved the power of ouster, that the plaintiff received the same power of ouster defined in the *kuboolyut*, which the zemindar had

5. Suit to set aside certain leases set up by defendant, appellant, as having been executed by plaintiffs. The *zillah* judge has held the leases not to be genuine; and in appeal that judgment is upon the evidence affirmed

6. A farming lease for a definite period constitutes a personal contract between the lessor and the lessee, by the terms of which they must be bound. Consequently, where the tenant was not empowered by the terms of the lease to sell or transfer, held, that the lessor was not bound to recognise a sale which the tenant had effected. There is no analogy between this case and that of hereditary tenures, which are salable by law

7. Held, that when, under the terms of the lease, the tenant was bound to quit when required by the zemindar, a further provision in the lease, that the tenant should be allowed to take away his house or receive its value assessed by a *punchayet*, a provision which appellant asserted had not been complied with, was no reason for non-compliance with the notice to quit

8. When the *pottah* provided that the *ryot* was not to alienate his tenure without consent of the zemindar previously obtained, it was held that such provision was not a mere form, and that the zemindar was right in refusing to recognise the sale made without his consent

9. There was no analogy between the cases cited and this. Lower court's order upheld, decreeing that petitioner, having received the money, for which he executed a *zur-i-peshgee* lease, but would not give effect thereto, must repay the sum with interest

10. Held by the whole Court, that, when a contract is entered into by two inferior holders, in the absence of express agreement on the point, the inferior of the two is not entitled to claim from his superior a modification of the contract, on the ground that the last has obtained certain advantages from the zemindar. Both must be bound by the terms of the contract into which they have entered, and by that alone.

Held also by the majority, that, under the terms of the 7th clause of the kuboolyut executed by the sub-lessee of the Government grantee, he is not entitled to a diminution of his rent corresponding with the diminution of revenue, which the Government grantee has to pay under the rules of 1853.

The appeal of the defendants, special appellants, is decreed, and that of the plaintiff dismissed, with costs

756

11. Held, on the special appeal of Government and the plaintiff below, that the title of the defendant, based solely on the pottahs of the farmers whose leases have expired, cannot stand; that the land in suit being of recent formation, no right arising from length of occupancy can be asserted; and that the rights of ryots acquired from the farmers cease on the expiry of the farm of the grantor, and the tenants are liable to eviction by the successor of the grantor.

Held, also, that the ticket of the collector, granted to the defendant, is simply a recognition of the ryots' occupancy previous to settlement, and gives no right to the party receiving it to occupy after the settlement, should the settling party determine otherwise, and should, as in the present instance, there be no recognition of the defendant's rights at the time of settlement; that consequently defendant is a mere tenant at will as to the lands covered by the ticket, and liable to be evicted.

Held, that, as defendant is as to the whole land decreed to him by the judge a mere tenant at will, he can have no right to any land which has accreted to such a precarious holding.

The special appeals of the Government and plaintiff below decreed, with costs, and the appeal of defendant, special appellant, dismissed, with costs

1044

12. In a suit to set aside a lease, held, on the evidence and probabilities of the case, that the lease pleaded by defendants was not executed by plaintiff, and that he was entitled to have it set aside and to a decree for the possession he claimed

1063

13. Where the defendant had executed a kuboolyut binding himself to pay rent from the beginning of 1256, it was no ground for throwing out the plaintiff's claim, that the crops had been harvested before the kuboolyut was executed.

Where there was a clause in the lease, authorising the appellant to appoint a sezawul in the event of failure to pay the rent, such appointment did not release the farmer from his liability for any difference between the collection and the rent which he stipulated to pay

1141

14. Held, in a case in which defendant talookdars had originally conditioned to furnish the zemindar with certain papers respecting rent and area of the lands held by them, the plaintiffs, sub-farmers, as representing the zemindar, could not sue for such papers on the agreement of the talookdars with the zemindar, subsequent to the expiry of their sub-lease,—the above conditions having then ceased to have effect

1233

15. A putneedar, on taking a putnee, executed a separate engagement (ikrar) to the zemindars not to increase the rents of certain ryots. He subsequently let his putnee in farm. The farmer sued to raise the rents of the ryots, and the ikrar or engagement not to enhance, being on insufficient stamp, was not looked at, and the farmer obtained a decree against the ryots for the enhanced rate of rent.

A suit was subsequently brought by the zemindars, after getting the ikrar properly stamped, against the putneedar and his lessor, for the enforcement of the terms of the agreement or ikrar, but the suit was dismissed by the lower courts, the claim being considered identical with that in the previous suit.

Held, on special appeal, that the zemindars were entitled to have their suit inquired into, as they were no party to the previous suit, and the ikrar given by the putneedar now duly stamped was equally binding on his representative, the lessee, as far as regarded the ryots of the plaintiff's estate.

Case remanded for investigation on the merits 1308

16. Permission to cultivate waste and jungle land in a pottah, held not to bring it within the term of "junglebooree pottah" 1531

17. Where a party obtained a lease on certain conditions for 30 years, which lease was superseded, in order to suit their convenience, by another lease for three years with different conditions, and formally relinquished the second lease, it was held that he could not fall back on any of the conditions of the original lease or found any rights upon that instrument 1534

18. On an appeal to the effect that, failing the production of a mokurree pottah, a suit for possession and mesne profits could not be brought on the production of an umuldustuk in proof of possession, and of payments of rents by tiacadars to plaintiff under it—

Held, that the proof of the umuldustuk terming plaintiff mokurree-dar, and of possession and of payments of rents by tiacadars to plaintiff under it, evidenced an executed and not merely an executory contract, and thus plaintiff's suit could lie as brought.

Held also, that possession under an umuldustuk mentioning a tenure as a mokurree one, and the payment of rents for years under it, are, without a formal lease and kubooyut, sufficient to prove a mokurree tenure in this case.

Held further, that the above proof and that of the payment of a premium for the tenure show a contract for a mokurree acted on by both parties.

But in the absence of the mokurree pottah, and under the precedents of this Court, ruling that the words "*from generation to generation*" must be used to make the tenure hereditary, it must be considered a life grant 1572

19. A lease granted by one of a body of joint sharers not empowered to act for his fellow sharers, and without their concurrence, held not to be a valid instrument.

A guardian appointed by the civil court has, by Section 5, Regulation XVII. of 1805, the same powers in the management of the estate of the minor as the proprietors themselves. A lease from him in concurrence with the other sharer was, therefore, held valid.

A lease from year to year without mention of any fixed term is a yearly lease terminable at the option of either party.

Special words must be used to convey an estate at a fixed rent, either for life or in perpetuity.

Where the defendants claim merely as tenants and all the parties affected by the plaintiff's averments of title are before the court and acquiesce, it is not open to the defendants to question plaintiff's title to sue.

Defendants, having held over on an originally good title, must be regarded as tenants on sufferance, and cannot be looked on as trespassers under the lease which proved invalid, as they held under decisions of the courts

1576

20. When the date from which rent was to be paid was not mentioned in the lease, it was held that plaintiff, who pleaded a verbal promise on the part of the defendants, was, under the circumstances, not entitled to recover rent for a period previous to the date of the lease.

Held also, that when the lessee had previous possession, and it was unnecessary for the lessor to take any steps to put him in possession, the lessee, in the absence of any stipulated period in the lease from which rent was to be paid, was liable for rent from the date of the lease, and not from the commencement of the following year

1593

21. Leases created in favor of parties after the lessor had voluntarily relinquished possession of his property in favor of his wife, set aside, as conveying no title, although the relinquishment of the property by the lessor had been declared inoperative against his creditors, this declaration being held only to effect those who were defrauded by the transfer

1650

LIABILITY.

Order of lower court reversed, on the evidence on record in respect of liability of a foudjaree pleader for loss of bank notes, sent by a prisoner on trial through his hands, and delivered to the party, who stood security for prisoner's presence, to be deposited in court

804

LIFE INTEREST.

See Joint Property.

LIMITATION.

1. The lower court's order in dismissal of the suit, as barred by limitation, reversed; for as regarded portion of the property, the cause of action had arisen to plaintiffs within twelve years of institution of suit, and regarding the remaining portion, the law of limitation was to be applied or not, according to the state of facts found

28

2. Suit brought by A to recover, under the will of his father B, a village purchased with funds of B, in the name of a younger brother C, and which C, through a foreclosed mortgage, had sold.

The purchase of the village from the funds of the father B is accepted as established; hence is assumed the presumption that the purchase was originally made for the father's benefit as real purchaser, and that the onus of rebutting this presumption was cast on defendant.

It is held to have been proved by defendant that, reckoning from plaintiff's majority, for more than twelve years plaintiff did not enjoy any possessory interest in the village, and, assuming that the original purchase created a presumptive or resulting trust in favor of the father B, it is also held that limitation runs against B, or his representative A, and in favor of the adverse right enjoyed for more than twelve years by C and his vendee.

Held, also, that the nature of this case (that is, the possession and ostensible title of B) so substantially differed from an earlier action between the two brothers, in which, after an award made under Act IV.

of 1840, plaintiff sued to recover as heir to his father, that plaintiff was not competent to take twelve years from the date of the decision in the first suit, within which to bring this suit.

Held, also, (in a separate appeal preferred by defendant,) upon the same ground, that plaintiff's failure to include this village in his first suit does not warrant the dismissal of this suit

158

Held by the Court, adhering to its previous judgment, that as long as the relation of trustee and *cestui que trust* is acknowledged to exist between parties, and the trust is continued, lapse of time can constitute no bar to an account or other proper relief for the *cestui que trust*, but where the relation is no longer admitted to exist, or time and long acquiescence have obscured the nature and character of the trust, or the acts of the parties or other circumstances give rise to presumptions unfavourable to its continuance, in all such cases the Court will refuse relief on the ground of lapse of time and its inability to do complete justice. This doctrine applies to express trusts and *a fortiori* to cases of implied or constructive trust.

Held, that in the present case, which is one of constructive trust, as no recognition of plaintiff's right either by word or act occurred during 20 years subsequent to plaintiff's reaching his majority, and as during the whole of that period, defendant, the party in possession, acted as absolute owner of it, and held *bona fide* possession adverse to the plaintiff, plaintiff's suit is barred by the statute of limitations.

Application rejected, with costs

1441

3. Appeal dismissed, plaintiffs failing to prove possession of the chur within term of limitation

171

4. In a suit for possession of alluvion, in which boundaries were disputed, part of the ground was by local inquiry identified with former revenue measurements, and variously proved to have been all along in defendant's possession. To it the statute of limitations applied; and to accretions upon it, therefore, plaintiffs could have no claim

297

5. Suit brought to set aside two *zur-i-peshgee* leases in so far as they covered plaintiff's share of certain property, the ground of action being the incompetency of the lessor, plaintiff's elder brother, to make the leases during plaintiff's minority.

Held, that as more than twelve years had elapsed from the date of plaintiff's majority before the suit was brought, and plaintiff in the plaint admitted his knowledge of the leases and of his brother's acts from the time of his majority, the action is barred by lapse of time

304

6. Where suit was laid to cancel a deed of sale as a deed never executed, but it was proved that it existed in 1839, and was known to plaintiffs' predecessors as an adverse title against them held by the purchaser, and urged by him then in a court of law, the lower court rightly applied the statute of limitations to their claim. Appeal dismissed; petitioners also were held liable for defendants' costs

313

Acts on the part of a purchaser of real property having been held to prove his possession for a period of 12 years and upwards, limitation ruled to bar the action, and review applied for rejected on that ground

1518

7. Suit to set aside sale of an under-tenure made in execution of a summary decree, which, in a regular suit subsequently instituted, had been annulled; also to quash a second summary suit and second sale.

Held, that though this suit was not instituted till more than one year had elapsed from date of second summary decree, plaintiff's action was not barred, as plaintiff was not personally liable as a defaulter in the second summary suit, and as plaintiff had specially pleaded and the *principal sudder ameen* found that the zemindar himself held the under-tenure in the name of his naib, and brought a collusive suit against the nominal tenant.

Held also that, with respect to the second sale in execution, a suit to set it aside is not restricted to one year from the date of the sale

328

8. A village, belonging originally to one of plaintiffs' ancestors, had been granted by him as roonumaice to a relative who, in 1839, sold it to defendants. In 1842 another ancestor sued to establish the invalidity of the grant, but his suit was dismissed. In that suit he admitted defendants to be in possession of the entire area of the village. In 1843, defendants having sued for separation of the village from plaintiffs' talook and determination of their share of the assessment of the talook, the principal sudder ameen assumed on oral evidence that the area of the village contained 250 beegahs, and fixed the assessment accordingly. In 1847 the survey officers ascertained the area to be 380 beegahs. Plaintiff now sues for the difference—130 beegahs, alleging that it had been decided the village only comprised 250 beegahs, that the defendants had dispossessed him of 130 beegahs in 1252, and that, as owner of the parent talook, he was entitled to all land in excess of the 250 beegahs. The principal sudder ameen held the suit barred by limitation. Plaintiff then appealed, on the ground that the principal sudder ameen, by confining him to the single issue of limitation, had prevented him from adducing proof of dispossession. Held, that the issue obviously required proof from him of possession within twelve years, and that the principal sudder ameen's erroneous estimate of the issue in 1843 was immaterial. Plaintiff's case dismissed on his failure to prove either that the grant was limited to 250 beegahs, or that he had been in possession within the period of limitation

404

9. Two suits were brought before the Court in appeal, in one of which special appellant was defendant, and in the other plaintiff.

In the first case the plea of limitation is raised; and it is admitted that plaintiff, a sale purchaser, brought his action for the land claimed more than twelve years after his purchase; but as the land in question is noabad, the property of Government, and as Government had assigned over its right to plaintiff, this action, brought within twelve years from the assignment, is held to be within time.

The second suit was nonsuited by the lower appellate court upon the ground of multifariousness, as being brought to correct the entries in measurement records and for settlement; but, in reversal of the order below, the case is remanded for trial on its merits

411

10. Plea of limitation held not to apply, as the majority of plaintiff must be reckoned from the end of his eighteenth year, he suing as zemindar in possession of one portion of an estate for recovery of another portion

442

11. Case remanded, the limitation term properly being reckoned from the date of confirmation of sale, and therefore of possession, not from the date when the rents of right belonged to plaintiff

443

12. Principal sudder ameen's decision on point of limitation, with reference to facts of the case, upheld

574

13. Where the question of limitation is involved in the main issue of the validity of the plaintiffs' title, and the merits of the case have been fully investigated in the lower court, it is unnecessary for the appellate court, in reversing the order of dismissal on the ground of limitation passed by the lower court, to remand the case for a decision on the merits

604

14. Case remanded for determination of the points raised on the certificate. Plaintiff sued for possession of certain property, stating that the defendants were his trustees. Defendants pleaded that plaintiff had given up the property.

The judge, on appeal, reversed the decision of the lower court, holding the suit to be barred by the statute of limitations. The judge should have ascertained whether plaintiff's allegation were true or not, for if defendant held as trustees for plaintiff, his suit is not barred

675

15. Held that the words "violence and force," made use of in Section 3, Regulation II. of 1805, apply only to cases when parties, making use of violence and force, do so without having any legal right whatever

737

16. Plaintiff sought to institute a suit for possession after the lapse of twelve years, under the provisions of Section 3, Regulation II. of 1805, on the plea that defendant had fraudulently obtained possession of the land now claimed. Held, that as defendant had been in adverse possession for more than twelve years, and such adverse possession was known to the plaintiff's vendors and their predecessors, who had it in their power to bring an action for possession within time, but failed to do so, the present suit, under Section 3, Regulation II. of 1805, would not lie

815

17. The correct reckoning showed the suit to be barred by lapse of time. Dismissed

861

18. Held, that, when the existence of a person, or personal relation, or state of things is once established by proof, the law presumes that the person, relation, or state of things continues to exist as before, until the contrary is shown, or till a different presumption is raised from the nature of the subject in question.

Held that, in the present case, in which the defendants are in possession of certain property as owners, and the plaintiffs are suing for possession of an under-tenure, of which they allege they were dispossessed nearly twelve years before they brought this action for possession, and the statute of limitations has been pleaded against them, the presumption is, that the *status quo* has continued back until the plaintiffs can show that another state of things was in existence. This cessation of the alleged previous state of things by the act of the defendants is the plaintiffs' cause of action, and plaintiffs must show that it occurred within twelve years previous to the institution of the suit, which, in the present case, they failed to do. The important rule of evidence, therefore, contended for by Mr. Newmarch, is inapplicable to the circumstances before the Court.

Held also that, under Section 14, Regulation III. of 1793, a party is not entitled to a new period of twelve years from the date of an order of nonsuit, but, if once nonsuited, when bringing a second suit he is

entitled to a deduction of the period during which the previous suit was pending.

Review rejected, with costs

879

19. Plaintiffs sue to reverse an alleged sale which took place in May 1833 or Jeyt 1240, and the present suit is instituted twenty-one years subsequently. They plead that the statute of limitations cannot be urged against them effectually, 1st, in consequence of their minority; and, 2nd, in consequence of their father having demised previously to the sale.

Held, that the plaintiffs being Hindoos, and suing not as proprietors of an estate, reached their majority at the end of their fifteenth year, and that, in order to make the necessary calculation in order to bring them within time, it is necessary that they prove distinctly the dates of their several births. As, moreover, the dates of their fathers' deaths are contested, and as, if they occurred after the sale, the interval between the sale and their deaths will count against the plaintiffs, it is necessary for the plaintiffs to prove the particular time at which they died before the sale.

Held that, from the evidence on the record, neither the one point nor the other is satisfactorily proved, and, consequently, plaintiffs are out of court under the statute of limitations.

Appeal of defendant decreed, with costs. Plaintiffs' appeal dismissed, with costs

885

20. Under the circumstances, plaintiff's minority could not be pleaded so as to bring his case within limitation, which might have expired, it seemed probable, before his father's death

927

21. The suit being within time from the date of confirmation of settlement, limitation law was no bar

962

22. Held, in conformity with construction No. 1342, and a decision of this Court, of the 7th December 1858, that when a party is under legal obligation to move a court within a given period, he may be allowed to postpone such motion to a day beyond the period, supposing the last day of the latter be a holiday

1008

23. Remanded on a former precedent, relative to the non-applicability of the law of limitations to suits for re-adjustment of rents of chur diluvion

1011

24. An assignment on a wuqf estate, which had been paid from 1781 to 1835, and for which decrees had on several occasions been obtained, was stopped by the local agents in 1835, in consequence of the resumption court having pronounced the grant which contained the assessment invalid. On the 21st March 1838 plaintiff petitioned, and also made an application to the collector in 1840, which was finally disallowed by commissioner on the 9th April 1844. On the 8th April 1856 he instituted this suit. Held, that the suit was barred by the statute of limitations, and that the application to the collector, not being an application to a competent court, would not bar limitation.

Held, also, that there can be no recurring cause of action, when the right of the plaintiff has been formally denied

1068

25. The law of limitation was incorrectly applied to the case of a mukurree tenure, within revenue purchaser's estate, when it had not been ascertained whether the tenure was prior or not to settlement

1171

26. Suit for recovery of possession dismissed under the statute of limitations, the lower courts holding that the time would count from the date of the decree for rent passed by the moonsiff on the 27th December 1841, while plaintiff contended that he was not put out of possession till 1843, when the decree was executed. Suit remanded, to determine the time at which plaintiff's possession was disturbed, for if, notwithstanding the decree for rents, it continued undisturbed till 1843, the plaintiff's suit would be in time

1198

27. Held, that when an act of sale is the plaintiff's cause of action, the day of sale must be included in the calculation of the period of twelve years' limitation; and that conjectures, as to the real date of the filing of the plaint, contradicted by the record, are insufficient to extend the time

1232

28. Application for review rejected, as the petitioners, as a party to a judicial award passed by the superintendent of survey, had failed to institute a suit to set it aside within three years from the promulgation of Act XIII. of 1848, and in consequence their remedy was held to be altogether lost, and the successful termination of a suit by another party to the award of the superintendent of survey for the same property, could not give the petitioners any right to sue such party for the possession of that property

1264

29. Defendant's husband purchased 14 beegahs of lakhiraj land at a sale to realise certain monies due to Government. Subsequently, a ryot of the zemindars sued petitioner's husband for possession of the land as a portion of his under-tenure, and he made his zemindars defendants in the case. The court of first instance gave the ryot a decree. The lakhirajdar then appealed, and the ryot, whilst the case was in appeal, withdrew it. The zemindars have now sued the lakhirajdar and the ryot for possession of the land, alleging as their cause of action the collusive withdrawal of the suit between their ryot and the lakhirajdar.

The court of first instance dismissed plaintiffs' claim, being of opinion that, from the date on which plaintiffs' possession was first disturbed through the eviction of their tenant and setting up by the lakhirajdar of an adverse possession, more than twelve years had elapsed.

The principal sudder ameen held that plaintiffs' cause of action only arose on the collusive withdrawal of the suit in which their ryot was plaintiff, and as from this date twelve years had not elapsed, the principal sudder ameen remitted the case for inquiry on the merits.

Held, that, under the circumstances of this case, the cause of action to the plaintiffs as against the lakhirajdar arose on the date on which the lakhirajdar, according to plaintiffs' own statement, took up a possession adverse to them, that, consequently, if no sufficient cause for the delay be shown, plaintiffs are out of court under the statute of limitations.

Held, also, that the facts of this case, even admitting for argument's sake that the withdrawal of the suit by the ryot was collusive, and giving every weight to the precedent afforded by the case of *Enayet Hossein versus Alee Buksh and Mahomed Raza*, before the Privy Council, disclose no sufficient cause precluding them from obtaining redress within twelve years from the date on which their cause of action arose against the defendant lakhirajdar.

K

- Special appeal dismissed, with costs 1322
30. Claim to recover possession of land usurped under color of a foreclosed mortgage, dismissed as barred by law of limitation, the only evidence of possession within twelve years being some decrees in suits to realize rents, and justify distraints under kubooryuts 1330
31. When limitation was not pleaded in the first court, it was held that the principal sadder ameen's order, dismissing part of the claim on the ground of limitation, was incorrect. His order was accordingly reversed and that of the first court approved 1502
32. Held, on a special appeal admitted to try whether the period during which a party was in jail under a sentence of 14 years' imprisonment for an affray, was to be deducted in calculating the period allowed by law for suing, that the disability was one created by the party imprisoned, and that such imprisonment is not a satisfactory reason for not proceeding with a suit, as is required to be shown by Section 14, Regulation III. of 1793. 1509
- Held further, that the imprisonment did not create any legal impediment to the party's proceeding through means of law agents 1610
33. Limitation held to be in abeyance during a time when litigation was going on between the parties regarding the same cause of action 1610
34. Where a party sold property belonging to a minor nephew, and conditioned that he would cause his nephew to ratify the sale within two months after his nephew attained majority, or would give an equivalent from other property belonging to himself, it was held that, as the nephew refused to confirm the sale and sued and obtained a decree setting aside the sale of his property, an action by the vendee to enforce the conditions of the contract with his vendor should have been brought within twelve years after the expiry of the two months subsequent to the date on which the nephew attained majority, and not from the date of the nephew's decree setting aside the sale. The suit was accordingly held to be barred by the law of limitation 1618

MAHOMEDAN LAW.

Endowment.

When a party sought to recover possession of wuqf property, and to be allowed to exercise the office of mootuwallee jointly with the defendant, held, that, as the plaintiff had been proved by a judicial decision of a civil court to have misappropriated part of the wuqf property, he could not look to the court to assist him, as he did not come into court with clean hands 285

Inheritance.

Plaintiff sued certain defendants to set aside a deed of gift, alleged to have been executed by her, pleading that it was a forgery, and executed by other parties without her knowledge and consent, though probably for her benefit.

Defendant Mirza Mahomed Jaffer Khan answers that the deed of gift is a *bona fide* document, given for good consideration. The other defendants do not appear.

The lower court dismissed plaintiff's claim, being of opinion that the deed of gift was concocted by the non-appearing defendants, but with

the knowledge and consent of plaintiff, with a view of defrauding third parties.

Held, on appeal by Mahomed Jaffer Khan, that on the pleadings in this case the simple issue between the parties before the court is whether the deed of gift is an authentic document or not, and whether the consideration pleaded by defendant passed to plaintiff or not; and that it was not competent to the principal sudder ameen to stigmatise the plaintiff's conduct as fraudulent when such a plea is not entered upon by defendants.

Held also, that as the defendant appealing is unable to prove the special plea of consideration raised by him, plaintiff is entitled to that which, but for the deed set up by the defendant, which has been declared fraudulent against two defendants who have not appealed, confessedly belonged to her.

Decision of the lower court reversed as regards the plaintiff and the property sued for decreed to her with wasilat from Assin 1756 to the date on which she may obtain possession, and with costs.

Liability of Heirs.

The heirs of a Mahomedan, who succeeded to his property, but fraudulently pleaded renunciation of inheritance in order to baffle their father's creditors, held personally liable, though with liberty to prove, if they can, in execution of decree, that any property which the creditors may attach was not inherited from their father or acquired with funds derived from him. It is the duty of a Mahomedan heir to marshal the effects and pay the debts of the person whose property he inherits, before he applies it to any other purposes; and, if he fails to do this, he places himself in the position of a wrong-doer and incurs a personal liability.

Pre-emption.

1. The requirements of the law of pre-emption were not fulfilled by respondent. Lower court's order reversed.

2. The Mahomedan law of shuffa requires that a claim of pre-emption shall be preferred without delay. The judge, looking to this, threw out a suit for pre-emption, which had been instituted eight years after the cause of action arose.

Held, that the limit allowed for institution of a suit by the Regulations cannot be restricted by the operation of the Mahomedan law, and the judge's order accordingly reversed.

3. Case remanded to the court of first instance, as the judge's alteration of the arbitrator's award did in effect cancel it.

4. Remanded to lower court, to decide on the appellant's right of pre-emption according to Mahomedan law.

5. The plaintiff, as defendant in a former suit, pleaded a preferential right of pre-emption, as an 8-anna sharer, over the plaintiff in that suit, who had purchased a 4-anna share and sued his vendor and the 8-anna sharer for possession. No issue was then raised regarding pre-emption. On the present suit being brought to establish the right of pre-emption, the lower court held it to be barred under Sections 12 and 16, Regulation III. of 1793. The Court remanded the case for the trial of the right of pre-emption.

MASTER AND SERVANT.

Judgment having been given in the court below against special appellant for damage done on account of crops forcibly carried away by his servants, it is held in special appeal that, as the plundered crop was not delivered to special appellant, and the acts of the servants were not done in the ordinary course of their employment, nor with their master's assent, nor under his direction or subsequent ratification, the special appellant was not liable to plaintiffs

199

MESNE PROFITS.

See Wasilat.

MINISTERIAL OFFICER.

1. Petition rejected, and Court sees no reason to interfere with the matter to which it refers

1224

2. Held, that full legal proof is not requisite for the suspension of a native ministerial officer, but that in this case, there being no ground even for strong suspicion, the judge's order of suspension must be reversed

1226

MISNOMER.

See Actions, Parties to, No. 1.

MOOKURUREE.

See Lease.

MORTGAGE.

1. Held, that, in an usufructuary conditional sale, that is, a conditional sale with possession and enjoyment of the rent and profits granted to the mortgagee, it is incumbent on the mortgagor, after notice of foreclosure, if he desire to preserve his equity of redemption, to pay any sum claimed by the mortgagee as still due within the year of grace. If he fail to do so, he acts *at his own risk*, and if, eventually, after a suit brought by him to redeem, one pice is found to have been due at the expiry of the year of grace, his right to redeem must be declared to have lapsed.

Held also, that in a mortgage of this nature, on a suit for redemption by the mortgagor, when the mortgagee has filed his accounts of collections, with a view of ascertaining whether any equity be outstanding in the mortgage, or not, the account must be made up to the date of the *expiry of the year of grace, and not to any subsequent period.*

127

2. Case remanded, as the lower courts have disposed of the suits on an erroneous principle. The proper course to be taken in deciding the cases pointed out.

A seeks to obtain possession of four villages, conditionally sold to him by four separate parties, B, C, D, and E, after due notice of foreclosure. B had previously pledged his rights in one village to R, as security for a loan. R sued and got an *ex-parte* decree, under which, in execution, he sold the rights of B, and purchased them himself, and instituted a suit for possession, making A, as well as B, parties to the suit. The two suits were disposed of together, and the lower courts held that, as R had obtained a decree against B, his right could not be

questioned, though A pleaded that the decree was collusive. They therefore gave possession to R, and dismissed the claim of A, on the ground that his mortgage was collusive.

Held, that, as the conditional sale pleaded by A was last in date, the lower courts should have first inquired into its *bona fides*, irrespective of the decree pleaded by R. Should it be found to be invalid, the whole claim of A would be rejected. If proved to be valid, A might then question the validity of the *ex-parte* decree held by R; and if that should prove to be a transaction in good faith, A should be put in possession of the property pledged by the other mortgagors

132

3. Plaintiff sought to obtain possession under a deed of conditional sale from Rajah Gungaishchunder, after due notice of foreclosure. Defendants, appellants, are in possession as auction purchasers, and plead that the property having been mortgaged to them as security for the payment of the principal sum lent by them to the rajah, he was incompetent to mortgage the property to another party till the whole of their claim was liquidated; and that having obtained a decree for the interest due on their debts, they had sold the property in execution and purchased it. They further pleaded collusion between plaintiff and the rajah to deprive them of possession.

Held, that, as the mortgage bond referred to by the defendants was security for the payment only of the principal of their debt, which was liquidated before the expiry of the year of grace, and the property was sold by them in execution of their decree for interest, not in virtue of their mortgage, but as simple decree-holders, they purchased the property with all liens on it created by the judgment debtor. Held further, that where execution of a deed is admitted and a plea of collusion to set it aside is urged, it is necessary to prove such collusion. Appeal dismissed

144

4. Where the mortgagee had filed accounts for seventeen years, and endeavored to account for the absence of certain intermediate accounts, it was held that the judge, instead of dismissing the suit, because these accounts were not filed, should have accepted those that had been brought forward if found worthy of credit; and if the mortgagee were unable to account satisfactorily for the missing accounts, he should have accepted the defendants' estimate of profits for three years, and have thus determined whether the loan and interest had been liquidated from the usufruct

270

5. Plaintiff lent to the defendants a certain quantity of grain, defendants covenanting that plaintiff should retain possession of certain lands belonging to them and repay himself from the crops. Plaintiff obtained possession and was subsequently dispossessed by defendants. He then sued for the equivalent of the grain in money. The court nonsuited him. He now sues for possession, in order that he may repay himself from the produce of the lands, according to the terms of the contract. The lower court gave plaintiff a decree. The judge, on the appeal of two defendants, nonsuited the plaintiff, as plaintiff was not at liberty to disregard the procedure laid down by the Regulation XVII. of 1806 with reference to mortgages.

Held, on special appeal, that the judge's order was incorrect; that the transaction was in the nature of an usufructuary mortgage; and the law of 1806, applicable to conditional sales, was entirely beside the question.

- Cases remitted for re-investigation on the merits 322
6. Under former precedents, the lower court was not competent to interfere summarily in a suit for possession of land held by a mortgagee under simple usufructuary mortgage 392
7. Suit to recover refund of surplus collections from an estate, the usufructuary mortgage of which had been given to the defendants till the loan with interest was paid off. As the accounts filed by the plaintiffs and the evidence of the attesting putwarce were held by the Court to be unworthy of credit, and the ameen's investigation, unsupported by other evidence, was considered insufficient to support the plaintiffs' allegation, it was held, that the data on which the principal sudder ameen had made the account, being the most favorable to the plaintiffs, but by which a balance was still shown to be due by them to the defendants, were the best available, and that the decision of the lower court dismissing the suit was, under the circumstances, correct. Appeal dismissed 812
8. The mortgagees were entitled to retain the two villages, or their entire security, till full repayment of their advance 823
9. Lower court was correct in treating the sur-i-peeshee by the malik of the taluk and ayma lands to defendants, which were assigned as security for the loan, as a mortgage between the parties, and in the manner of reckoning the accounts on the basis of plaintiff's ikrar to the mortgagees. The kutkeenadars, being merely lessees of the mortgagees, were not parties to the mortgage, and not liable 977
10. Where A, borrowing money from B, executed a bond not to alienate certain property, and at the same time gave C a farming lease of part of it, and transferred a part by kut-kubalah to D, and it was proved that the lands so transferred were covered by the bonds, and B held decrees of court against A, judgment of lower court upheld, holding D's purchase from A subject to its burdens, and liable for B's claim 1004
11. When the terms of a "bhurnanamah," under which defendants had made over certain villages to the plaintiffs, mortgagees, as security for the interest on a loan, contained provisions enabling the mortgagees, on the occurrence of certain circumstances, to bring an action to recover the principal of their debt, it was held that these conditions in the "bhurnanamah" did not alter its character, or render the transaction between the parties other than an usufructuary mortgage, and that the mortgagees, whether they sued to recover the principal of their debt, or were sued by the mortgagors for possession, were bound, as in other cases of usufructuary mortgage, to produce their accounts to enable the court to determine whether the principal of the debt, with interest, had or had not been realised from the proceeds of the estate 1076
12. Held, that, when the purchasers of the rights and interests of a mortgagor, with full notice of the mortgage, illegally dispossess the usufructuary mortgagee, denying the fact of the mortgage, and thus give the mortgagee the power of suing for the remainder of the sum borrowed due, with interest, they, by their illegal act, have deprived themselves of the right which they otherwise would have had of calling for the accounts from the mortgagee, and of having them verified by him, and must defend the case brought as best they can. Had they allowed the mortgagee to remain in possession, and sued for possession of the pro-

erty which they had purchased, on the ground that the sum borrowed had been paid off from the rents of the estate, they would clearly have been entitled, under Section 2, Regulation XV. of 1793, to call on plaintiff as the mortgagee to file the accounts, and to verify them on solemn declaration.

Held, that, in an action brought for a sum due, for which a particular property has been pledged, it is competent to the plaintiff to follow that property into whosoever's hands it may have passed, it having always passed subject to plaintiff's lien; but it is not competent to the Court, on any principle, to give the plaintiff a *personal* decree against purchasers of the mortgagor's rights in the estate, on the ground that they are in possession of it. The estate, and the estate alone, is the security for the debt.

Held, also, that the fact of the defendant pleading the general issue, does not absolve the courts from passing a decree in plaintiff's favor conformably with law and legal principles; and if the courts have passed a decree not in consonance with the one or other, or both, it is quite competent to the defendant pleading the general issue to come up in special appeal against the decree of the lower court on the particular point on which such decree is contrary either to law or legal principles, and this notwithstanding that the particular objection was not taken in the original pleadings

1181

13. Held, that where the relation of mortgagor and mortgagee is admitted to exist, the mortgagee cannot plead the statute of limitations; nor, when he denies that the party suing him to redeem the property mortgaged is the mortgagor, can he plead the statute on his own behalf, but, as trustee for the real mortgagor, he may claim that he may be made a party to the suit, in order that he may plead it himself: and the mortgagee is not bound to account to any person alleging himself to be mortgagor, until this last, having made the person, who is alleged by the mortgagee to be the real mortgagor, and sets up an adverse title to his own, a party to the suit, establishes his title as mortgagor

1273

14. Second mortgagee not having cleared the first mortgage on the property, and the property having been sold in satisfaction thereof, second mortgagee held to possess no lien on the property sold

1567

See Hindoo Law, Joint Family, No. 3.

„ Revenue.

MORTGAGE, FORECLOSURE OF.

1. The mortgagor failing to prove local custom of redeeming mortgage by paying the principal debt, and interest from the date of notice of foreclosure only, and such custom being not the law, his claim to a title to redemption could not be sustained

284

2. Held, that, as a general rule, a party suing for foreclosure and possession, is bound to give an account of his receipts, and to prove them, before he can get a declaration of his right to possession as under a sale become absolute. But as the objection was not taken below, nor the averment there made of the plaintiff's having repaid himself from the profits, the objection was over-ruled

490

3. The notice of foreclosure of mortgaged property situate in different jurisdictions was correctly issued

848

4. Held, that the Court is not at liberty to deviate from the mortgage laws of the statute book in force in this country, or to modify them so as to bring them in conformity with the English law on the same subject. Though, therefore, the payment of any part of the sum due within the period of grace opens the foreclosure under English law, still, as that is not the law in this country, the Court adheres to its previous ruling, that the existence of the smallest sum as still due, at the expiry of the period of grace deprives the mortgagor of his right to redeem.

Held also, that the Court cannot now, for the first time, allow the accounts filed by the mortgagee to be questioned. They were accepted by the lower courts, and, on special appeal, attempts were made to get rid of them, not by questioning their correctness, but by the contention, 1st, that the accounts should be taken up to the date of the decree of possession passed in favor of the mortgagor, and, 2nd, that the mortgage, which had been originally a conditional sale, had, by order of the civil court, been converted into a simple usufructuary mortgage, in other words, that a deed, in which time was an important element, had been converted into one in which time was no element at all.

Application for review rejected, with costs

5. In suits for possession after foreclosure of mortgage, the period from which limitation counts commences at the expiry of the year of grace, and not from the time when the loan became payable

NONSUIT

See Appeal

NOTICE

A suit was decided *ex parte*, after notice of suit and other process required by law had been served at the defendant's family residence. Defendant appeals, on the ground that, as she has been for some time a resident in Calcutta, such service was not a proper service. When the case came up for hearing, counsel for appellants attempted to show that no process whatever had been issued, but as the appellant had admitted issue of process at the family mansion, and was unable to show that she no longer resided there, the appeal was rejected

PAUPER

See Act No. 1839

" " VII. of 1869

PERJURY

1. Held, that it is competent to a judge, if he thinks that there was evidence of any person on the record before him is tainted with perjury, whether that evidence has actually been recorded before himself or not, to summon the witness and order his commitment to be tried for perjury.

Held also, that, pending a special appeal, which could only be on a point of law, there was no ground to interfere or stay the judgment order on the above points.

2. Held, that an order of the lower court, directing the forwarding of a party to the magistrate on a charge of subornation of perjury, and another on a charge of perjury, forms a portion of the decree appealed against, and that consequently it is within the competency of the Court to stay that order.

Order stayed accordingly

PLEADERS' FEES.

An order by a zillah judge, recording the regular amount of pleaders' fees in a miscellaneous case, being objected to as likely to interfere with the private arrangement made with the pleader, was treated as surplusage

See Arbitration, No. 2.

PLEADINGS.

1. Held, that when the statute of limitations, either ordinary or special, in bar of hearing a suit, was not distinctly brought forward by the defendant in his answer, he must be considered to have waived the plea and consented to have the case tried on its merits, and that under such circumstances a plea of limitation could not be heard by the appellate court

2. Held that, on a plea in bar being overruled, and the case being remanded to be decided on its merits, it is not competent, on the merits having been entered into, and the case coming up in appeal, for the party originally pleading the plea in bar, who did not appeal against the order rejecting it, to re-open that point. Not having appealed against the order at the time, and having allowed the case to be decided on its merits, he must be considered to have waived that plea.

Special appeal rejected, with costs

3. A plaintiff claiming under a will, and not by virtue of inheritance, cannot be permitted to shift her ground, and ask a decree on the ground of right by inheritance

4. Held, that when a lease is granted benames to a person, and a separate deed of assignment to him of a great portion of the rent payable to the zemindar is executed at the same time, the transaction, though contained on two different documents, must be considered as one transaction; and that, in any suit brought by the zemindar or his representatives against the lessee, the whole transaction must be pleaded, and if, from any cause, that may not be done, the lessee has no separate action for remedying the effect of his own negligence, but must suffer the penalty of his own neglect.

Case dismissed, and decision of lower court affirmed

5. A defendant must plead all his defence; and cannot found a new suit upon a plea not urged in defence in a prior action about the same matter

6. Held, that the lower courts should invariably restrict themselves to the issues raised in the pleadings by the parties before them, and not import into the case issues not naturally arising out of their statements.

Held, also, that it is not competent to defendants, respondents, before this Court, to take up a line of pleading different from that

adopted by them in the court below, and that if such a course is attempted, the parties should at once be restricted to their original allegations, and the case be decided on those statements, and those alone.

Held, that both from evidence and the probabilities of the case, the kubooyat and deed of suretyship propounded by the plaintiffs, appellants, are genuine and authentic documents, and that the deed of acquittance and release and the receipts, filed by the defendants and pleaded by them in avoidance of the plaintiffs' present claim, are not genuine documents.

The decision of the lower court is reversed, and plaintiffs' (appellants') suit decreed, with costs of both courts ... 1095

7. In a suit for rent, where a supplemental plaint was filed, which differed from the plaint as to the quantity of land and its boundaries and the amount of rent claimed, it was held that this was not the supply of an omission allowed by law, but an alteration of the claim, and, consequently, the order of nonsuit by the lower court was correct ... 1390

PLAINT

Held, a plaint was inadmissible where the boundaries given in the original and amended plaint varied ... 148

See Supplemental Plaint.

PLEADINGS, VARIANCE IN.

In a suit for pre-emption, plaintiff stated the fact on which he based his action to have occurred in 1258 B. S. Defendant pleaded that the sale of the property, in regard to which plaintiff's claim to pre-emption was made, occurred only in 1259.

Plaintiff then said that 1258 had been stated by him by a clerical error for 1259.

The lower appellate court held, as a fact, that this was no clerical error.

Held, that such a variance as to so essential a fact was more than a defect of plaint, and afforded so strong proof of the falsehood of plaintiff's claim as justified the dismissal of the suit ... 1648

PRACTICE

See Actions.

PROCEDURE

See Actions, Practice.

PROCESSES

In a summary suit for rent, where the name of the defaulting ryot was incorrectly given, but the notices prescribed by law were duly served, it was held that, in the absence of any fraud, the misnomer was insufficient to vitiate the proceedings before the collector ... 380

PRINCIPAL AND AGENT.

See Agent and Principal.

PUTNEE.

1. Mr. Dunlop, proprietor of the Meerunge concern, took an estate in putnee. After his death, his executors sold part of the Meerunge concern to Mr. French and part to defendant. The lands of the putnee were consequently divided without the knowledge or consent of the zemindars, who sued the defendant for the rent as representative of Mr. Dunlop. He pleaded his liability to pay rent only for such portion of the putnee as was in his use and occupation. The judge, on remand, having received copy of an answer of Mr. French, filed by him in a separate suit for the rent of this putnee, gave a decree against defendant.

Held, that the answer of Mr. French in another suit, which had not been decided, could not be considered as legal evidence against defendant, till the averments contained therein had been adopted by the court.

Held, further, that, as defendant succeeded Mr. Dunlop as proprietor of the concern, and was, as far as the plaintiffs could be expected to know, the representative of Mr. Dunlop, no information of the private arrangements made by the executors of Mr. Dunlop having been made to plaintiffs, in whose books Mr. Dunlop's name still continued to be registered as putneedar, the plaintiffs were right in making the demand of the whole rent from him; that, as he had previously filed a petition claiming possession of the whole putnee, and declaring himself liable for the rent, he must, from it and other evidence adduced by the plaintiffs, be considered liable for the whole rent; that it was for defendant, who advanced the plea, to prove separate use and occupation; and that if he wished to have his liability limited, he should apply to the zemindars to have his name properly registered.

2. A durputneedar obtained possession of a putnee for a short time under Clause 4, Section 13, Regulation VIII. of 1819, in consequence of the putneedar's having withheld his rent. The plea of the durputneedar in whose farm the putnee was included, that he was not liable for the rent of the putnee during this period, overruled, as he could not be permitted to take advantage of his own laches to evade his contract with his lessor.

3. Held, that as Regulation VIII. of 1819 specially allows others than the defaulting putneedar to lodge the arrears before the day of sale, the term "unless the amount of the demand be lodged," made use of in Clause 1, Section 14, Regulation VIII. of 1819, cannot be intended to refer to the putneedar, but to the other persons alluded to, as entitled to lodge the amount and stop the sale.

4. Judgment in accordance with that dated 30th April 1860, collector of Tipperah *versus* Golukchunder Shaha.

5. A putneedar cannot hold a durputnee liable for an old balance. When the putnee was sold to a new durputneedar for balance of rent, a previous balance due upon a decree became a personal debt of the ousted durputneedar. Order of lower court reversed.

6. The officer in charge of the collectorate did not hold a public sale after proper forms had been observed; and though the purchaser failed to pay up on the eighth day, the defaulter still failed to tender his balance. The said sale was allowed to be concluded after the

- deposit had been collected, and then re-credited to the buyer. But there was no case shown for reversal of the sale. ... 809
7. Lower court's order upheld as to interest payable by the putneedar in possession to the purchaser, to whom the putnee was decreed ... 818
- Held, that the receiver, under his general power of compelling payment of rent, can do so by compelling it under the processes of Regulation VIII of 1819.
8. Held, likewise, that, if the putneedar receives notice before the 15th Bysakh of a sale to take place on the 1st Jeyt, that is sufficient legal notice.
- Held, further, that it is not necessary that each separate act of a collector, with a view to a sale under Regulation VIII of 1819, shall form the subject of a separate proceeding, but it is sufficient if the final proceeding contains all due and necessary matters of record.
- Held, also, that the collector need not adjust the balance claimed and the balance due between the zemindar and putneedar, before sale, the zemindar being responsible for that matter.
- Held, finally, that where a putnee was in balance and was legally brought to sale, it may be a question, if defaulter has purchased benamie, whether ousted shewars may not sue him for rights, but not for reversal of sale to the detriment of zemindar. ... 1198
9. Held, that Section 16, Regulation VII of 1832 relates to public sales alone, and does not affect the jurisdiction which Section 6, Regulation VIII of 1819 conferred on the judge in respect to the registry of private transfers. JUDICIAL SALE.
- Held, also, that no summary appeal lies from the order of a judge passed under Section 6, Regulation VIII of 1819, which requires a zemindar to accept the security, if approved by the judge in appeal, and to give effect to the transfer without delay.
- Held, that a summary appeal from the order of a judge under Section 6, Regulation VIII of 1819, directing a zemindar to give effect to a transfer without delay, is not allowed by law ... 1216
10. Held, that a durputneedar, who is in possession of a putnee tenure under the operation of Clause 4, Section 13, Regulation VIII of 1819, is entitled to recover the amount advanced by him from any profits of the estate that may come to hand, whether they were in the shape of past or future rents. At the same time he is equally at liberty, if so minded, in postponement of his own interests, to assign the outstanding rents of any period anterior or even subsequent to his possession, to the putneedar, giving due notice of the same to the tenantry, so that they may in no way be endangered.
- Held, also, that, as on the present case, which was to set aside the sale of plaintiff's durputnee, it took place in execution of a summary decree for rent by the putneedar out of possession, there is no plea of previous payment to the durputneedar in possession, but only one to the effect that there was no balance due, and as the lower courts found that there was a balance, the sale of plaintiff's tenure in execution by the putneedar, with a view to realise a sum assigned to him by the durputneedar in possession, is quite legal. The assent of the durputneedar to the putneedar's claim, by which act the assignment was made, was given after the institution of the suit by the putneedar; but the effect of that assent is retrospectively to

sanction the demand of the putneedar, and to regularise the proceedings which have taken place against the tenure of special appellants.

Special appeal dismissed, with costs. 1327

11. When two parties severally claimed to be proprietors of an estate which was let in putnee, and claimed the right to receive rent from the receiver of the Supreme Court, who held possession of the putnee on account of the putneedar, each on the ground that he was in possession, it was held that, as possession of an estate let in putnee could only be symbolical, and the proof of having obtained the possession adduced by the plaintiff was not so satisfactory as that of the defendants, who had, under orders of the Supreme Court, been receiving the rent from the receiver for some years previous to the institution of the suit, the present suit must be dismissed, and the defendants, so long as their present position remained undisturbed, and by plaintiff's obtaining a decree to eject them, must be held entitled to receive the rents. 1404

12. A and B took a putnee in equal shares; B relinquished his share and A was called upon to engage for the whole, but did not do so and was ousted.

A and C then sued for the recovery of the putnee, alleging that B was only a benamsee, and C was the real sharer with A.

The judge found as a fact that C had no connection with the putnee, and that A, under the terms of his lease, could not hold a half share only, and dismissed the suit.

Held by the Court, that the judge's decision was correct. 1403

See Ghatwalee, No. 1.

„ Tentures.

PRE-EMPTION.

See Mahomedan Law.

RECEIVER.

See Act VIII 1859, No. 4.

RECOVERY OF LAND.

See Land, Possession of.

REMAND.

1. Cases remanded to the lower appellate court for re-consideration on account of previous incomplete investigation... 6, 30, 115, 117, 227, 228, 333, 435, 583, 585, 588, 600, 744, 824, 910, 922, 934, 940, 1014, 1127, 1146, 1151, 1163, 1180.

2. Cases remanded with a view to local investigation. 120, 203, 655.

3. Case remanded for re-trial, as the decision and circular order quoted by the lower court are not applicable. It was held also that the point to be determined was, whether the defendants had been accustomed to collect rent from the plaintiffs and other shahermis, without taking kubooyuts from them; for if they had, the absence of a kubooyut would be no bar to their right to realise rent.

4. Case remanded for account to be taken between plaintiff, mortgagor, and defendants, mortgagees, agreeably to Section 11, Regulation XV. of 1793	5
5. Case remanded for inquiry into existence of asserted rent-free tenure before 1st December 1790 or not, and for application of the law of limitation according to precedents, in reversal of previous judgment in this case	8
6. Order of remand on application for special appeal. The judge held the claim barred, as it was false in part, and dismissed the suit. He was told that he should have given an opinion upon the other allegation of the plaintiff	32
7. Case remanded, the decree relied upon to support a deed pleaded not being in a case between the parties in this suit	74
8. Case remanded, in order that the principal sudder ameen may re-investigate the case, looking to the entirety of the evidence produced by the defendant, as well as that filed by the plaintiff, which he has not done, and pass whatever order may eventually seem just and proper	77
9. Plaintiff sued for possession of 84 kanes, and for the correction of chittas regarding 2 kanes, by which they, instead of being entered as a portion of his talook Hureerampore, have been made to form a portion of Ram Dass, though settled with him by the semindar of turuf Joynarain Ghosal as a portion of Hureerampore.	
The defendant pleaded, that the land in dispute was a portion of talook Ram Dass, and that it was settled with him as such by the collector, when the estate of Joynarain Ghosal was under the Court of Wards.	
The principal sudder ameen dismissed the case, inasmuch as the collector, having settled the land as a portion of turuf Ram Dass, the fact cannot now be questioned.	
Held, that it was incumbent on the principal sudder ameen to inquire whether plaintiff is of right entitled to the land as sued for by him, as the mere act of the collector, acting as agent of the Court of Wards, could not alone be decisive of the relative rights of the parties to the suit.	
Case remitted to the principal sudder ameen, with directions that he re-investigate the case irrespective of the act of the collector, and looking only to the evidence of right, both documentary and oral, filed by both parties	
10. Suit remanded, as the lower court had applied the statute of limitations erroneously	78
11. Lower court founded a decision on a supposed admission which did not exist. Remand	115
12. Case remanded; because lower court was bound under the circumstances to consider not merely whether the alleged dispossession had occurred, but much more to which party belonged the right of inheritance claimed by both	121
13. Suit being brought to recover possession of certain lands, the first court tried the fact of possession only: on appeal, the case was disposed of on the question of right.	152
Remanded, that the question of right may be disposed of by the first court	166

14. Case remanded, to try the question of title as between the claimants to the land sued for, the lower appellate court having confined itself to an adjudication as to the nature of the land 467

15. Plaintiffs sued for possession of certain lands of which they had been illegally dispossessed by defendants, the farmers.

Defendants denied the illegal dispossession of plaintiffs, but pleaded that, after the institution of the summary suit, they had sent a *sesawul* to collect the rents; that the summary suit was decided *ex-parte* on the 31st August 1853, and the *sesawul* has collected the rents ever since.

The judge dismissed the plaintiffs' suit.

Held, on special appeal, that the possession of a *sesawul* is a mere temporary possession for a particular purpose; that, on that purpose being effected, it ceases; and that it requires to be renewed in order to be legal.

Case remanded, in order that the judge may determine whether, after the decision of the summary suit *ex-parte* on the 31st August 1853, the possession of the defendant continued to be a legal possession or not, and pass whatever order may seem just and proper 468

16. The issue, whether the land in dispute was plaintiff's service land, or land which he had leased from the defendant, not being fully adjudicated, case remanded, in order that the principal assistant commissioner may investigate whether any *ticca* lease, and for what extent of land, was given to defendant, and what are his liabilities under its terms with reference to plaintiff's claim in this suit 469

17. A suit being brought for arrears of rent at a specific rate, as fixed by a *kuboolput*, failing proof of that deed, the suit should be dismissed; and case is remanded for a specific finding on that point 477

18. Remanded for fresh hearing; the inquiry of lower court having been imperfect, and the bywaste based on a misapprehension 485

19. Remanded; the issues adjudicated in lower court not arising from the pleadings: it should try whether, for the land occupied by Government bunds, rent or compensation from Government is not due 498

20. The principal *sudder ameen* was required, under Section 4, Act XXXIII. of 1854, to certify clearly the grounds of his judgment; and the explanation rendered involving both new matter and inconsistencies with first judgment, the case is remanded 520

21. Suits in regard to *thannadaree* lands, remanded upon the precedent cited 528

22. Case remanded for decision upon the pleas raised, not on a question of fraud, not put forward as invalidating the sale 801

23. Case remanded, the question at issue not being one of resumption, and the judge having misapplied the precedents cited. The case was to be tried as one of ordinary boundary dispute 81

24. Remanded to the *zillah* judge that he may try whether special appellant, a defendant who had not appeared in the first court, shows good cause for the failure in his appearance 309

25. Case remitted, in order that the principal *sudder ameen* may remand the case to the *moonsiff*, who will give the plaintiff an opportunity of filing the petition alleged to have been executed by the defendant acknowledging the sale of the property in suit by her husband *Sudanund* to the plaintiff, and who will, after testing its 820

genuineness, if it be questioned, and scrutinising its terms, pass whatever order may eventually seem just and proper

26. Suit brought to give effect to a deed of compromise said to have been executed after an earlier suit between the same parties had been decided, was dismissed by the first court as being in a matter already adjudicated; but the case was remanded by the lower appellate court, on the ground that the plaintiff had set forth in this suit a new cause of action. Order of remand affirmed in special appeal

27. Remanded: the order of remand was not justified when plaintiff sufficiently indicated the extent and boundaries of the lands

28. In a suit to resume certain lands, the plea of limitation was raised, and, on trial, was rejected by the judge, on the ground that the grant of the defendant was not valid; but the case is remanded to try simply the existence of the tenure before the 1st December 1790, as the validity of the grant and competency of the grantor are not points relevant to the question of limitation

29. Case remanded, in order that it might be tried, first, as to how far the contract for the execution of a certain work had been fulfilled, and thus to what extent the other party was entitled to get the rest done by other hands at the charge of the contractor, and whether such charge was reasonable; and, next, as to what balance, if any, was due to the contractor after such deduction and the fine provided for in the agreement

30. Case remitted to the judge, in order that he may remand it to the principal sudder ameen for re-investigation on theoretical issues raised in the pleadings, which are—

1st. Whether the howlader's tenure of defendant covers Gribhooshun's share of the *wasul taluk* alone, or both the shares of Gribhooshun and Shushoobhooshun?

2nd. If the former, then is plaintiff's present claim conformable with law?

3rd. If the latter, then, looking to the terms of the howlader's *pottah*, both as to measurement and subsequent assessment, is the claim sustainable or not?

31. Case sent back, in order that the alleged minority of one of the defendants in the summary suit, who was sued personally and not by his guardian, at the time the rents were due for which that suit was brought, may be inquired into. If he were then a minor, the suit brought against him personally must be dismissed. If he were then of age, the judge will pass such a decision as may seem just and proper

32. Held, that all landholders are competent to enhance rents, and that this privilege is not confined to auction-purchasers; and that Section 9, Regulation V. of 1812, prescribes the steps to be taken by landholders generally before a tenant becomes liable for enhanced rent

33. The principal sudder ameen having dismissed a suit for arrears of rent, on the ground that, according to Section 16, Regulation VIII. of 1831, a *hukoodet* was essential, and that the fact of plaintiff's exhibits having been tampered with rendered it unnecessary to inquire into the fact of the defendant's possession of the tenure, and having refused to summon the defendant, unless plaintiff would take an oath that the defendant's signature to a certain paper was a forgery, the case

was remanded to the principal sudder ameen, with instructions to inquire into the merits of the case, and examine the defendant, if necessary.

34. Case remanded for inquiry into the issues directed; it was material, in order to know whether deceased's chelas were responsible or not for his debt, to find whether his deed of gift to them of his property was valid, whether they were in possession when the debt was contracted, or after his decease took possession as his heirs, and, therefore, liable for the burdens upon the property.

35. Case remanded for re-adjustment of costs.

36. Case remanded, as the point at issue was not stated by the judge, nor the reasons for reversing the order of the lower court recorded in full.

37. Held, that the judge has altogether misunderstood the import of the entire decree of the moonsiff of Haidra, dated 24th May 1880, upon which he has founded his decree. Case remitted, in order that the judge, having correctly interpreted that decree in the mode pointed out by the Court, and having reconsidered the case, may pass whatsoever order may seem to him just and proper.

38. Remanded, in order that the judge may take into consideration certain dates as explained to the Court, and the proofs of defendants' possession of the land as lakhiraj previous to 1st December 1790.

39. Plaintiff sunder three parcels of land, and obtained a decree from the moonsiff. An appeal was preferred by parties interested in one parcel only, but the principal sudder ameen reversed the entire decree. Moonsiff's decision ordered to stand, as regards that portion of the decision against which no appeal was preferred, and case remanded as regards remaining portion, that proper issue may be tried.

40. Under the circumstances explained in the judgment, case remanded again, that lower court may re-try it, restricting its attention to the point of adjustment of rent, as before directed, without re-opening the question of the validity of a certain pattah, which point a competent court had already set at rest.

41. Case remanded, having been transferred from one moonsiff's file to another unavailing to petitioner.

42. A remand postponed for appearance of adverse party.

43. Case remanded. Though there was no defence, the lower court should yet have sifted the proofs for the prosecution.

44. Remanded in accordance with precedent cited.

45. Case remanded, for re-trial on the proper issue raised by the case, not whether a jumma-wail-bakee had accompanied the demand of rent, but whether plaintiff had discharged his rent or not under a legal assignment.

46. Suit remanded, that the issue regarding the share of the judgment debtor in an estate purchased by plaintiff may be determined. A finding on the above issue being necessary to determine whether putnee of the said estate, granted by the said judgment debtor and other defendants to another set of defendants, is collusive or otherwise.

47. In a suit for and of wood misappropriated, in which plaintiffs had alleged an admission by the defendant of theft of wood in a former case, and the judge dismissed the suit, on the

- ground that the case referred to had been remanded for re-investigation,—order reversed, and case remanded, on ground that plaintiffs' suit was based on their general right to the wood, which ought to be investigated, and that the alleged admission was merely evidence of their claim ... 687
48. The judge having assumed a title by a grant, further proof beyond such assumption was deemed requisite, and the case remanded accordingly ... 688
49. Case remanded to the court of first instance, as the judge's alteration of the arbitrator's award did in effect cancel it ... 715
50. So much of the judge's order as declares the existence of Sreenath Mullick's rights, not interfered with in special appeal. The case is remanded, however, in order that the judge may give a clear opinion regarding the existence of the rights of Muthoornath Mullick from the evidence on the record regarding it—a point on which no clear opinion was given; the mortgage of Sreenath's rights in 1842 being no evidence at all regarding the existence of any rights in Muthoornath ... 725
51. Case remanded, as the point now at issue was not similar to that formerly disposed of, and could not be considered *res adjudicata* ... 825
52. Case remanded, for, though the fact be proved as stated by the judge, he has not determined what effect a solehnamah executed by the parties would have ... 826
53. Case remanded, as the lower courts have decided the case on a point not properly at issue between the parties. Plaintiff claimed to have purchased a third of certain property from Nusserut Reza, alleged to be his share of an ancestral estate. The defendants denied the right of Nusserut Reza to that share, and further pleaded that the sale by Nusserut Reza to plaintiff was collusive, the deed of sale not having been executed on the date it bears. The lower courts have declared the plaintiff's deed of sale collusive, though Nusserut Reza admits that he executed it, and on this finding dismissed the suit, declaring that plaintiff had no right to bring the action. As respondents, however, admit that Nusserut Reza could bring an action, and plaintiff is his acknowledged representative, it was held that the first point to be tried was the right of Nusserut Reza to any portion of the ancestral estate, his share of which he admits he has sold to the plaintiff, and not the *bona fide* nature of the sale between Nusserut Reza and plaintiff ... 949
54. Remand, that lower court may legally determine the identity of the party, purporting to be executor of the power of attorney ... 973
55. Case remanded, that the judge, who has erroneously thrown the onus of proof on the plaintiffs, may decide whether the defendants have succeeded in proving that the property in dispute was acquired with the separate funds of the members of a joint Hindoo family through whom they claim ... 989
56. In a suit for the forfeiture of an estate under the terms of an agreement stipulating forfeiture in default of paying the Government revenue, held, that the case must be remanded for the trial of two issues.
- 1st.—Whether a balance alleged to have been paid for arrears of Government revenue was paid before or after sunset of the last day of payment, i. e., in time to avoid risk of sale or not.

2nd.—Whether, if there was a balance after sunset of the latest day for payment, it was caused by the fraud of plaintiff's agent in regard to undertaking to pay it in time and not doing so, or not: and that the terms of the agreement should then be applied according to the facts found on the above issues

994

57. A and B, bankers at Mirzapore, sold to C and D, of the same place, a hoondie on the house of E and F, the corresponding house at Patna of A and B. C and D forwarded the hoondie to G and H, the corresponding house at Patna of C and D, but did not endorse it to them. G and H endorsed the hoondie to I and others, the plaintiffs, who presented the hoondie to E and F, on whom it was drawn. E and F refused payment, on the ground that C and D at Mirzapore, and G and H at Patna, had failed. Plaintiffs then sued the two houses of Mirzapore and the two of Patna. A and B pleaded that they had deposited the amount by order of the civil court there, to meet the demands of creditors of C and D. C and D pleaded they had passed the hoondie to G and H in ordinary course of business, and G and H that they duly sold and endorsed it to plaintiffs.

The principal sudder ameen held, that plaintiffs gave no consideration, and the transfer was fictitious. The judge considered the absence of an endorsement by C and D to G and H fatal to plaintiffs' case.

Held that, as the point taken by the judge was not pleaded below, it could not be taken in special appeal.

Held also, that, as the *bona fide* character of the plaintiffs' purchase had been disputed, not decided, and as the holder of a bill is presumed to be a holder for value until the contrary be shown, defendants should first show a *prima facie* case of *mala fides*, and if that were proved, plaintiffs must show the *bona fide* character of the transaction between the endorser and themselves

1053

58. The deed of lease on mortgage, by defendant, was proof of plaintiff's possession at the time sufficient to bar the application of limitation. Remanded

1165

59. Remanded to consider the boundary dispute between defendant and auction-purchaser, although it had been settled between defendant and former proprietor

1178

The plaintiff, a gossain, sued defendant, a bustumee, for the intestate property, in her possession, of a bustum, who died within the gossain's alleged jurisdiction.

The plaintiff's claim was one on prescriptive title; but the judge held that such intestate property escheated to Government.

Held, that the alleged prescriptive title of plaintiff should have been investigated by the judge; and as this has not been done, the case is remanded for that purpose

1297

60. Plaintiff took a putnee lease from defendant, special appellant, and his co-proprietors, for eight years, from 1260 to 1268, and in 1262 B. E. he sued his lessors for possession, with mesne profits, alleging that, in breach of their contract, they had failed to give him possession of the villages; he had leased, and that up to the date of suit he had not obtained possession.

Defendant admitted the lease, denied the breach of contract alleged, and averred that plaintiff had been in possession throughout and was then in possession of the property leased to him.

The principal sudder ameen found that plaintiff had not been out of possession, and dismissed his suit.

Held by this Court, that the judge has not carried out the order of the Court, when remanding the case to him on the 5th May 1858; that the tone of the judge's remarks in commenting upon the Court's previous order is unbecoming; and that the case must again be remanded, in order that the judge may inquire and decide clearly and distinctly, whether plaintiff has been kept out of *de facto* possession by the defendant during the whole period stated by him or not. If he has not, but is at present in possession, plaintiff's suit, as laid out at present, must be dismissed. If plaintiff has been kept altogether out of possession, as pleaded by him, the judge will decree to plaintiff possession with *waslat* calculated at the *net*, not the *gross*, collections of the villages sued for.

Held also, that a statement made by the plaintiff in 1281, a year embraced in the present suit, in a petition presented to the criminal court, in a matter with which the defendant was unconnected, can be no legitimate evidence of the fact stated in it in the present suit ... 1316

61. Plaintiffs, as *semdars* of Rughoopore Peepra, sue the defendants for certain lands in excess of what they were entitled to as *nankardars* of the same villages, as ascertained at the period of the resumption and settlement of the *nankar mehal*.

Defendants alleged that, on their purchase of the *nankar mehal*, they obtained possession of these lands, which had previously been held by plaintiffs, not as lands of Rughoopore Peepra, but as a portion of the *nankar mehal*.

Held that, on the pleadings in the case, the issue to be tried is, whether the lands in dispute were before the sale to defendants in possession of plaintiffs as a portion of their decennially settled estate Rughoopore Peepra, or are a portion of the *nankar mehal*.

Case remanded for re-investigation ... 1437

62. The plaintiff having never set up the special limitation of sixty years, the finding of the judge that such limitation would admit this suit disallowed, and case remanded, that the judge might decide whether or not plaintiff's plea of a dispossession within 12 years of suit was proved ... 1447

63. An order of nonsuit on the ground of overvaluation reversed in special appeal, and the court below directed to try the case in the manner pointed out by the Court ... 1452

64. Case remitted to the principal sudder ameen, in order that he may determine whether the bond, lease, and assignment were, as pleaded by the defendants, in the intention of the parties and under the custom of the part of the country in which it took place, one transaction or not. If they were, defendant will be clearly entitled to credit in the present suit, which is for a sum due, under a bond alone, for rents assigned and paid by the farmer to the plaintiff in liquidation of the debt incurred under the bond. If the transactions are separate, the view adopted by the principal sudder ameen will be correct ... 1471

65. Remanded for the reasons stated in the certificate of special appeal ... 1506

66. Case remanded regarding lands admitted by the defendants to be in possession of plaintiff ... 1508

67. Case remanded, that orders may be passed regarding the right to enhance the rent of lands found in excess of a mookurree tenure. 1511
68. Case remanded under the precedent of 19th August 1858, the judge having misled the appellant by his order allowing time to file his reasons of appeal after expiry of 30 days from date of decision appealed from. 1543
69. Case remanded, as the lower court had, on a plea of limitation, put the burden of proof on the wrong party. 1585
70. Case remanded, as the method of preparing the mortgagee's accounts adopted by the principal sudder ameen, and his restriction of interest to a sum equal to the sum borrowed, were incorrect. 1543
71. Copy of the copy of a deed not to be allowed to be received in review; the non-production of the original at the hearing of the case not being accounted for. 1597
72. Suit remanded for the re-consideration of a document upon which the lower court had not put the proper construction. 1608
73. Case remanded, the lower court having mistaken the issues. 1611
74. The lower appellate court having decided that, as the defendant was a khodkash ryot, the zemindar could not dispossess him without a summary decree for arrears, and this plea not being on the record, the case was remanded for re-trial. 1636
75. Case remanded, as an important preliminary issue of fact had to be tried before the rule of limitation could be held applicable as a bar to the action. 1688
76. Where a party sued to enforce a right of pre-emption and to set aside a mookurree lease, which was alleged to have been created to deprive him of his just right should he attempt to enforce his right of pre-emption, and the lower court had declared that plaintiff was entitled to possession under the right of pre-emption, but refused to set aside the mookurree, on the ground that the right of pre-emption gave plaintiff no right to disturb the acts of the former proprietor, the case was remanded to determine whether the mookurree lease was given in good faith, or was merely a fraudulent attempt to deprive plaintiff of his rights. 1653
77. Case remanded for determination of a certain plea put forward by the appellant, defendant, which had been overlooked by the lower court. 1655

See Limitation, No. 9.

REGULATION VIII. OF 1793, Section. 66.

See Jurisdiction, No. 9.

REGULATION I. OF 1798.

Regulation I. of 1798 does not apply to sur-i-peahgee leases for terms of years. It only applies to conditional sales. 1566

REGULATION II. OF 1806.

See Attachment.

REGULATION VIII. OF 1819.

Section 16, Regulation VII. of 1832 affects public sales only, not transfers under Section 6, Regulation VIII of 1819. 15920

See Putnee and Tenures.

REGULATION XIV. OF 1829.

See Security for Costs.

RENT, RECOVERY OF.

1. Held, that a suit for declaration of title to rents, and for rent against the same party, does not subject plaintiff to be nonsuited ... 75
2. Where one of several joint sharers granted a putnee, whether benamee, for his own benefit only, or as for all sharers, to defendants, and kept them out of possession, and collected the rents till the criminal court put them in possession, the defendants were entitled to have an account of the collections before being sued by the co-sharers for rents ... 142
3. Where a plaintiff sued to recover rent, and the defendant pleaded possession of the premises as proprietor, it was held that the rights of the respective parties must, under the circumstances, be determined before the claim for rent could be inquired into ... 281
4. Claim to a refund of part of rent paid, as founded upon stipulations between the landlord and tenant, dismissed, there being no evidence ... 291
5. Arrears of rent for 1260, 1262, and 1263, having been adjudged by the lower appellate court, that decision is modified with respect to the last two years, as the principal sudder ameen has misapprehended the effect of a previous decision passed in a suit brought for the rents of 1262, which determined that special appellants were not in possession of the land, and not liable for the rent claimed ... 363
6. The purchaser of a putnee at a sale in execution of decree, sued a durputneedar for rent. The latter pleaded payment to another party as purchaser from the same putneedar. The special appellant pleaded that a suit by that other party to reverse the sale in execution, and based on such alleged purchase, had been dismissed, and the judge has not considered the fact in his judgment in this case.
Held by the majority, that the case should be remanded for re-trial of special appellant's claim for rent as against the durputneedar, as the right of property was with special appellant by the decree *against* the other party, in their suit for the reversal of the sale in execution, at which sale special appellant had purchased ... 455
7. Proof of part payments at similar rates is a sufficient foundation for a suit for rent; and the lower court held to be wrong in dismissing the suit of a lessee, because he did not produce the counterpart of a pottah which plaintiff had at some former time received from the malik ... 571
8. When a sirkutnamah, by its terms, appears a collective engagement by ryots to pay rents at certain rates, held that the lower court was wrong in rejecting it without further investigation, on the ground of its not being a legal document ... 721
9. Defendant not proving the fact of an unliquidated debt alleged to be due to him, and urged as a set-off against the demand for rent, plaintiff was entitled to decree of his claim, with interest, and costs proportioned to the amount decreed ... 722
10. Where a defendant, sued for rent of a kuboolyut, comes into court with a denial of the kuboolyut, and its execution is proved, he has

no right to insist on the plaintiff's proving how, and from whom, he acquired his title	728
11. Decision of the lower court confirmed, as there were no sufficient grounds for questioning the estimate formed of the evidence by the principal sudder ameen, and the kuboolyut on which the suit was brought expressly provided for the payment of interest	747
12. In review of a judgment of this Court, dated 23rd March 1857, holding that a former proprietor's rights to receive rent ceased from date of sale, and not from that of confirmation of sale, held that until the tenant has notice, actual or symbolical, of the transfer of the rights of the old proprietor to receive rent, he is legally justified in paying his rent to the former proprietor as the party in real possession	820
13. A voluntary payment, by ryots, of a personal debt due by their zemindar to a third party, cannot be claimed as a set-off in a suit for rent brought by the farmer of the zemindaree against the ryots, the farmer not having been a consenting party to the payment	1039
14. Appeal dismissed, as the evidence to prove payment of the rents claimed by the zemindar was held to be insufficient for the purpose	1074
15. Plaintiff sued to reverse a summary suit, rejecting his claim for rent founded on a kuboolyut executed by two ryots. The proprietor of another talook was permitted to intervene, and the case was decided as one of title to the lands covered by the kuboolyut <i>between the two talookdars</i> .	
The moonsiff dismissed plaintiff's claim as barred by limitation. The judge declared the plea of limitation not applicable, and decided the case on the merits in plaintiff's favor.	
Held, that, as the case has been allowed to assume the form of one of right between the two talookdars, and the defendant has pleaded limitation, it is necessary, on the pleadings, for plaintiff to show that the former owner of the talook, which he purchased at a sale under Act VIII. of 1835, or he himself, subsequent to his purchase, and within twelve years antecedent to the institution of the present suit, collected rents from the ryots of the land in dispute, and thereby acquired possession of it, as pleaded by him.	
Case remanded for re-investigation to the judge on the point of limitation : should the judge think the plaintiff within time, he will remand the case to the court of first instance for investigation on the merits	1306
16. The dismissal of a suit for rent which had been brought prior to recovery of possession under a decree is no bar to an award of such rent, as wasilat after possession has been decreed	1449
17. Where a suit for rent is brought on kuboolyut, which is denied by the defendant and not proved by the plaintiff, the suit should, in conformity with the precedents of this Court, be dismissed	1500
18. On consideration of the evidence, held that a document called by the defendant a hookumnamah filed by him to prove payment of rupees 1700 rent, on 19th Pooas 1261, was invalid, and that plaintiff was consequently entitled to receive that sum and a further sum of rupees 315, which the defendant admitted to be due, with interest, from the commencement of 1262.	

Held also, that under the finding come to by the Court, the plaintiff was not liable to a fine for having brought a vexatious and unfounded suit; and that the law does not in any case authorise the imposition of double costs. The decision of the lower court altered accordingly

1584

See Actions, Form of, No. 6.

" Lease.

" Parties, No. 1.

RENT, ASSESSMENT OF.

1. In a suit by a landholder to assess land as invalid rent-free, held, that to enable the plea of limitation under Section 14, Regulation III. of 1793, to be successfully taken, defendant pleading limitation must show that the land existed as rent-free before 1st December 1790

717.

2. The lower court was right in declaring that the auction purchaser at a public sale was competent to set aside defendant's pottah, and to fix a new and fair rent; but the court had no power to fix the rate; nor could the new proprietor enhance it without previous notice

833

RENT, ENHANCEMENT OF.

1. In a suit by a zemindar for enhancement of the rent of a dependent talook possessed by defendants, appellants, it was held by the Court unanimously, that the service of notice by the plaintiff had been proved, and that the defendants had failed to establish the validity of the deeds under which they professed to hold the land at a guaranteed rate of assessment. But with respect to the enhanced assessment to be imposed, it was determined by a majority of the Court, that the case should be remanded to the principal sudder ameen for complete inquiry upon that point; and also, with the instruction that, as the plaintiff held a tieemousut talook under defendants, to the extent of one-third of their talook, the rent chargeable to defendants upon that land should be reckoned as a set-off for rent payable by plaintiff to them, leaving defendants to their own remedy for any higher rate that may be due by plaintiff to them

80

2. The lower court held the rent of a tenure to be not liable to enhancement under the provision of Section 26, Act I. of 1845, without determining under which of the protected classes the tenure fell. Case remanded for a distinct finding on this point

107.

3. Held by a majority of the Court, that the terms of the pottah merely provided for the payment of a certain rent as a yearly tenancy, but did not protect the tenant from enhancement; and that, if he wished to protect himself from enhancement, he should have taken care to have the lease so worded as to guard him from any demand for enhanced rent

136

4. Plaintiff being recognised by the civil court as her deceased husband's heir, under will, had a right to sue. In the lease to her husband there was no express stipulation about its lapse or its continuance on his death. But his widow's right to hold during the remainder of the lease was valid by general custom, so long as she paid

the rent faithfully, the more so as property had been pledged as security for the observance of all conditions of the lease. Possession and mesne profits during dispossession awarded. 187

5. Plaintiff sued defendant to enhance rent. Defendant pleaded a mookurree tenure under two pottahs of 1195 and 1198. The moonsiff, deeming the mookurree not proved, and defendant in possession of the land as sued for by plaintiff, decreed plaintiff's claim. The principal sudder ameen, considering the pottahs not proved, still found, from a decree of 1851, that defendant had always paid the same rent to plaintiff and plaintiff's farmer, and dismissed plaintiff's claim to enhance. 189

Held by the majority, that the above finding did not warrant a decree holding plaintiff to be incompetent to enhance. 190

6. In a suit for enhancement of rent, held, in accordance with a previous decision, that Section 41, Regulation VIII. of 1793 referred to the talookdars mentioned in Section 68, whose engagements with the zemindars were recorded at the time of the perpetual settlement, and that the onus of proving exemption from enhancement of rent is on the party claiming exemption. Plaintiff entitled to enhanced rates, with interest, from date of notice, defendants not having contested plaintiff's rates, and having raised objections to the general right to enhance, which they had failed to establish. 677

7. Special appeal admitted, to try whether lower court was right in decreeing enhancement of rent without notice, or enhancement of all of rent of putteet land improved by the tenant since date of his pottah. 685

8. A zemindar can issue notice of enhancement of a mookurree reader's rent, and on his non-compliance eject him. Judgment of majority. 692

9. Held, that defendant holding a shop without any lease was not in the position of a khoodkasht ryot, as held by the lower appellate court, but was subject to enhancement of rent at the pleasure of the owner, and liable to ejectment if he failed to pay such enhanced rent. 699

10. The competency of the auction-purchaser to enhance rent of an under-tenure was not affected by a decree having reference to exactions of rent from a former under-tenant. The limitation law inapplicable to questions of enhancement of rent, no agreements being extant. 705

11. As plaintiffs denied the pottahs, the questions otherwise arising upon them were not to be considered. In regard of the land in excess of the pottahs, the lower court's order was correct. 1176

12. Held, that the terms of the pottah propounded by the defendant precluded enhancement of rent, and that, as there was no enhancement of Government revenue in the tenure within which the defendant's holding is situated, the precedent quoted, as authorising the cancellation of under-tenures, was not applicable. 1198

13. Plaintiff is the holder of a resumed lakhiraj tenure within the Government khas mehal dhee Panchanugram, which has never been permanently settled. The tenure fell in balance, and was sold for arrears of rent, due under a temporary settlement, according to the terms of Act VIII. of 1836, and purchased by plaintiff, with whom Government has subsequently made a settlement in perpetuity. Plain-

tiff has issued notice on defendant to enhance his rents. Defendant demurs, and plaintiff sues for a declaration of his right to enhance.

Defendant pleads that he is a mookurureedar not liable to enhance-ment.

The principal sudder ameen declared defendant's deeds spurious, but, considering plaintiff's claim exorbitant, gave him a decree for a portion of what he claimed.

Held, on defendant's special appeal, that plaintiff, as a dependent talookdar under Government, is not, as a purchaser under Act VIII. of 1835, entitled to raise the rents of parties with fixed rights acquired by grant, prescription, or otherwise. As, however, defendant has failed to prove his mookururee, he is a tenant without any rights save those of occupancy, and is therefore liable to have his rents raised according to the capabilities of the land; and thus his special appeal on this score must be dismissed.

Held, also, on the special appeal of the plaintiff, that, as the defendant did not plead the incorrectness of the rates claimed by plaintiff, but contented himself with standing on his mookururee title, leaving plaintiff's allegation as to rates uncontradicted, he must be presumed, on an acknowledged principle of pleading, to have admitted the correctness of that which he has not traversed; and, consequently, that plaintiff on defendant's mookururee title being overruled, was entitled to a decree declaratory of his right to enhance at the full rates claimed by him.

Special appeal of plaintiff decreed accordingly

14. Review of the judgment, p. 1436, Decisions of 1858, admitted to try the legal question overlooked in the Court's judgment ... 1243

15. Held, that, under Section 9, Regulation VII. of 1822, it is quite competent to a zemindar, notwithstanding that he has accepted a settlement, to institute a civil action to set aside the rates entered in the jumma bundee of settlement; and that, to entitle him to succeed in such an action, it is only necessary for him to show that the rates therein entered are not the pergunnah rates which lands of the particular nature and in the particular situation ordinarily bear. ... 1249

Held also, that, in a suit like the present, which is not directly for the reversal of the rates entered in the jumma bundee, but for a declaration of his right, ten years after the settlement when he accepted the settlement rates, to enhance the rates then accepted by him, it is necessary for him to show that, since the period of the settlement, circumstances have occurred which have tended to raise the value of the ryots' lands, and, consequently, to entitle him to an increased share of the surplus profits of the lands, or, in other words, to an enhanced rent. Case remanded for re-investigation ... 1203

16. Plaintiff, a Government farmer, claimed to collect from the ryots at the average rate she paid to Government, without taking any agreement from them, or serving them with notice of her intention to enhance the rent they had previously paid direct to Government.

She instituted a summary suit in the collectorate for the rents of past years at this alleged rate, which was dismissed, and then brought the present suit to reverse the collector's decision.

Held that, as she could only have succeeded in the collectorate on proof of past payments or special agreement for rent at the rate she claimed, she could not, in a suit to set aside that decision on the ground

that it was erroneous, be permitted to raise questions which that suit did not involve, and that the collector's decision was correct and must be affirmed

1613

RENT, RECEIPTS FOR.

Held that, where there is no mention in the plaint of a demand for a receipt, penal damages under Section 63, Regulation VIII. of 1793, and the Sudder Court's judgment of 20th April 1858, page 764, Decisions, cannot be decreed. But the order decreeing plaintiff a receipt was affirmed

441

RESUMPTION.

1. Held, that Section 30, Regulation II. of 1819 applied to suits brought by proprietors of permanently settled estates and to Government when suing in that capacity; but in estates not permanently settled, whether the property of Government or of other parties, where Government seeks to resume as sovereign power, the suit for resumption, whether for land in excess of 100 beegahs, or otherwise, should be instituted by the collector under the provisions of Sections 5 to 23 of Regulation II. of 1819, modified by Regulation IX. of 1825.

Suits brought by private parties, under the provisions of Section 30, Regulation II. of 1819, before a collector, are appealable to the judge and from his judgment passed in such cases, as also in similar cases, originally instituted in the civil court, a *special* appeal lies to the Sudder Court. Suits under this section, in which Government is a defendant, or in which the revenue of the lands claimed may form part of an estate liable to a variable assessment, are appealable to the judge within three months from the date of the decision of the Board of Revenue, or other authority exercising the power of the Board; and from the order of the judge a special appeal will lie to the Sudder Court. In resumption suits brought by Government under Sections 5 to 23, Regulation II. of 1819, a party dissatisfied with the decision of the Board of Revenue may institute a suit in the civil court, to set aside such decision within one year, and such suit in respect to further pleading and evidence will be tried as an appeal. If the judge affirm the decision of the revenue authorities, a *special* appeal, but if he alter or annul the decision, a *regular* appeal, will lie to the Sudder Court

838

2. Where the collector erroneously acting under Section 30, Regulation II. of 1819, resumed land in a Government khas mahal, not a purchased estate of Government, his proceedings should have been submitted under Section 5 to the Board, and defendant ought to have sued in the civil court, not by an appeal, but a suit to reverse the revenue award; still he was misled by the collector, and order of lower court deciding against the Government claim could not be touched

1187

3. Where a putneedar had illegally resumed lands entered in a sunnud, comprising an area more than 100 beegahs in various villages which were subsequently resumed by Government, and the settlement of the resumed lands, including the villages, resumed by plaintiff, was made temporarily and then permanently with both plaintiff and defendants, it was held that the putneedar plaintiff's illegal resumption

was cancelled by the subsequent Government resumption, and that plaintiff being admitted to settle jointly with defendant for the resumed lands, was not entitled to demand rent from them under his illegal resumption.

110

See *Aluvion*, No. 1.

„ *Jurisdiction*, No. 5.

REVENUE, ASSESSMENT OF.

See *Settlement*.

REVENUE.

1. Plaintiff sued to recover from defendants, his co-sharers, revenue paid on their account. The judge held that defendants were not only out of possession, but kept out of possession by plaintiff. Special appeals accordingly dismissed.

81

2. Plaintiff A alleged that he paid the arrears of revenue due on a joint estate, and thus saved it from sale. He then sued for the recovery of the money, and got a decree, jointly and severally, against B, C, D, and E, his co-sharers. This decree provided that the person of E was not to be liable, as she was not in possession, but that her malikana in the collectorate was to be taken by the decree-holder. E was, however, found to have no malikana in deposit. In the meantime B and C got a decree against plaintiff A. At their request, their judgment debt to A was adjusted by a credit to them with A of their decree against A. B and C then got an acquittance from A for their original shares. In making this adjustment, the zillah judge apportioned a certain sum as due to A on his decree on account of E's share. A, alleging that B and C had possession of E's share, sued them for the sum so apportioned.

B and C pleaded that the whole case had been disposed of by the judge's order adjusting A's decree against them by crediting A with the sum of their decree against him, and that A's remedy was by appeal from that order, or by revival of execution, and that this suit would not lie; and, further, they had never held E's share.

The principal sudder ameen held that B and C did hold E's share; that they were responsible to A for the amount apportioned by the judge as for E's share; and that the accounts showed that A (plaintiff) had collected less than his co-sharers.

B and C appealed, urging that A (plaintiff) should have revived execution, or appealed from the judge's order of separate apportionment on account of E's share; that plaintiff's alleged advance was a personal debt separately due by those for whose respective interests it was made; that the apportionment referred only to the malikana of one year, and not to the share in the estate now sued for; and that appellants never held E's share or more than their own.

Held by a majority, that the original decree being a joint and several one, the acquittance pleaded by B and C could only affect their original shares, and not be a general release, and that acquittance was only the result of the particular mode of adjustment sought by B and C themselves.

Held, also, that the plaintiff was not wrong in suing as he has, instead of proceeding by revival of execution or appeal from the order of apportionment, because it was the court itself which indicated, by such order, the manner of proceeding, and wrongly made that apportionment, when the decree was clearly one against B, C, D, and E, jointly and severally, with a reservation only as to E's person, and thus plaintiff could sue for what remained unsatisfied of his decree.

Appeal dismissed

3. Held that, when a party sues to recover a certain sum of money, which, he alleges, he has paid on account of his co-sharers, whom he has wrongfully kept out of possession, he is not entitled to a decree for the amount paid minus the amount of rent which he may have received from the tenants; but as he does not come into court with clean hands, his suit must be dismissed.

Application for review rejected, with costs

RENT-FREE TENURES.

Appeal dismissed. The lower court found defendant's *lakshra* title before December 1, 1790, valid, and that limitation barred plaintiff's claim.

See Land, Possession of, No. 2.

„ Appeal, No. 1.

REVIEW OF JUDGMENT.

1. Application for review of judgment refused, inasmuch as it was competent to plaintiff, when the case was first before the Court, to produce the evidence, which he now desires to have admitted, and not having then produced it, he cannot be allowed now to tender it.

2. Application for review of judgment rejected, the Court seeing no reason to doubt the correctness of its former ruling, and the express tenor of Act XV. of 1853 forbidding the opening in appeal of any point not involved in the appellant's appeal without a formal appeal on the part of the respondent.

3. An order for costs was made in favor of petitioner in the miscellaneous department; but the proceedings furnish no means for estimating the amount of costs, and as the petitioners failed to ask for a specific order at the first hearing, this application is dismissed.

4. Held, also, that a respondent in special appeal, though he does not appear at the trial, may apply for a review of judgment on the same ground as a defendant, against whom an *ex-parte* decision has been given, is allowed to appeal on the record.

5. Two suits were brought by special appellant for arrears of rent and two points are raised in special appeal.

First, that as the first court, upon the arrear awarded, made no deduction by way of percentage as *surburakaree* allowance, and defendant did not appeal, it was not competent to the lower appellate court, upon the appeal of plaintiff, to award that deduction.

And, second, that the lower courts, which rejected plaintiff's claim for two years' rent, erred in not requiring defendant to prove the payment which he pleaded.

- Held that, upon the second point, the lower courts have mis-carried, and as plaintiff's claim must go back for re-consideration and adjustment as to the exact amount due by defendant, no definite opinion of this Court upon the first point is now called for ... 415
6. Review of judgment disallowed in absence of cause shown to disturb original decree ... 439
7. Held that, when a petition for a review of any judgment of the Sudder Court, or any inferior court, is presented *after three months*, previously to the admission of the review, the delay must be accounted for, and those causes should be of grave importance; otherwise, litigation might be indefinitely suspended, and all the evils incident to uncertainty in the right of property incurred.
- Held also, that, when this Court, on consideration of all the circumstances brought forward to account for the delay, and other reasons, has empowered a lower court to review its judgment, it is not competent to the Court, on the judgment so reviewed coming up before it in appeal, to allow any objection as to the admission of the review to be again argued before it. Appeal dismissed, with costs ... 459
8. On review of judgment, former decision maintained, in the absence of proof that the mortgage deed to appellant was executed in satisfaction of another person's debts ... 667
9. There was no just cause to review judgment 718, 719
10. Application for review of judgment rejected, with costs, as the fact now brought to the Court's notice was before prominently brought to the Court's notice, though, by an oversight, not explicitly mentioned in the judgment of the Court, and as the Court sees no reason for altering its opinion regarding the fraudulent nature of petitioner's alleged bill of sale ... 799
11. Application for review rejected, the grounds urged being considered insufficient ... 836
12. Application for review rejected, grounds alleged not being established ... 837
13. Application for review rejected for reasons assigned.
- Question whether, when a tenant sets up a title inconsistent with and larger than is warranted by the terms of his lease, his conduct works a forfeiture and entitles his landlord to eject him. Point not decided, as the subsequent demand for rent was in any case a clear waiver of the forfeiture ... 843
14. Application for review rejected, and it was held that the course previously followed by the Court, in requiring plaintiff to produce evidence of the validity of his mortgagor's title, notwithstanding the decree obtained by him in the Supreme Court against the heirs of such mortgagor, before requiring defendant to produce proof of her title, was under the circumstances correct ... 875
15. Applications for review of judgment, as to the facts of the cases rejected, no good grounds for impugning the correctness of the previous decision of the Court having been offered ... 881
16. Held on review, that the Court see no reason to recede from its former judgment on the whole case, or in any degree to modify the terms in which that judgment is expressed.
- Held also, that the Court in its previous judgment, by an oversight, omitted to allow a deduction of rs. 6844-7-9 made by the court below,

and not questioned by the plaintiffs in appeal before this Court, and gave interest upon the principal and interest united, during the pendency of the suit, instead of on the principal alone.

The former order of the Court to the extent above noted modified

17. Application for a review rejected, as the reasons on which it was applied for were held to be insufficient, and had been fully considered when the case was previously heard

18. Review not granted. Local inquiry could not be of use when there was no proof whatever of possession within twelve years

19. Held that, as the parties at the former hearing of the suit agreed to the accounts as prepared by the Court, and impliedly also the principle upon which it was drawn up, there was no ground for admitting a review

20. On an application for a review, on the grounds that the party giving a kubooyut was bound to pay his lessor according to the terms of it, it was found on a reference to the decisions cited by the applicant for review in support of her plea, that the lease on which she based her claim had been held invalid by those decisions.

Petition rejected

21. Held that, as the amcen was in the mofussil for one year and a half, and petitioner failed to file his documents within that time, no ground exists for granting a review on the score of surprise. The negligence of the plaintiff to his own interests having alone been the cause of the non-filing of the documents, they cannot now, on any plea, be received.

Held also, that, though there is in the opinion of Hindoos a necessity for the expenses of shradhs and offerings to the manes of ancestors, which there is not for those of ordinary poojahs, still both expenses are in some sense necessary; and as, when the estate was under the Court of Wards, the family expenses on account of poojahs were allowed, the Court see no sufficient reason for disallowing them.

The application for review rejected, after the correction of an evident error, with costs

22. Held, that the maxim, that every thing should be presumed to have been rightly and duly performed until the contrary is shown, will not apply to a judgment between parties other than those before the court, so as in the absence of fraud to render that previous judgment conclusive on the point to be decided. Under the maxim, that proceedings between two parties cannot bind a third, that judgment is open to analysis and criticism, and that weight only should be given to it which the soundness of the reasoning on which it is based warrants.

The Court seeing no reason to alter the opinion which it formed when the case was first before it, the application for review of judgment is rejected, with costs

23. Review of judgment admitted, inasmuch as the main fact on which the Court's judgment was based, viz., the registration of the mortgage in a zillah other than that in which the property mortgaged is situated, turns out to be an error, and as other facts, which, in connection with that main one, looked suspicious, when unsupported by it bear no such character

24. Application for review rejected, the decision not having been based on the point mooted, and the decision cited not being applicable 1061
25. Review admitted to try the legal question overlooked in the Court's judgment 1294
26. Application for review of judgment on the ground of mistake of pleader as to facts rejected, as the plea of error forms no ground for a review, and the judgment moreover is based upon precedent 1250
27. Application for review rejected, as the petitioners were unable to assign any reason for not having at the first trial brought to the notice of the Court the papers on which they now seek for the review 1263
28. Application for review of judgment rejected, the power of attorney now set up by the sons being revocable on the contingency of the father's death 1266
29. Application for review of judgment rejected, no new grounds being adduced *ib.*
30. Application for review of judgment rejected, as the grounds upon which the review was sought had been fully considered at the trial, and were held to be insufficient 1267
31. Application for review of judgment rejected, as the ground now advanced no way affects the substantial justice of the decision 1272
32. Application for review of judgment rejected, as the finding of the lower court on a question of fact could not be touched in special appeal 1296
33. Application for review rejected, as the ground now urged, though forming one of the grounds of special appeal, had been abandoned by petitioner's counsel at the first hearing 1299
34. Application for review rejected 1300
35. Application for review of judgment, on grounds similar to those previously urged, rejected 1298, 1301
36. A new pleader in review urged that the first issue directed by this Court to be tried in remand did not arise on the pleadings. Held, that where the pleaders in the original case had agreed that it did arise, and the pleadings showed that it did so, this application could not be allowed 1312
37. Application for review of judgment rejected, not only because the survey maps relied on were not produced at the trial of the case, but also because they furnish no conclusive evidence of the site of the disputed lands *ib.*
38. Application for review of judgment rejected, as the burden of proof was rightly placed on the defendant, and as, the alleged participation by plaintiff in fraud having formed no part of the issues arising out of the pleadings, it was not competent to the principal sudder ameen himself to raise that issue 1313
39. Application for review of judgment admitted, the majority of the Court having reversed the lower court's decree against the estate of the deceased debtor, without a cross appeal on the part of any one claiming an interest in the estate, and having expressed no opinion on the validity of that court's grounds for releasing the respondents from liability 1320
40. The plaintiff, who held a mortgage of a property, and the defendant, who held a bill of sale of the same property, but of a subsequent date, charged each other with fraud. The judge has given

no decided opinion on the issues thus raised. The case is consequently remanded for inquiry, *first*, as to the genuineness of the documents; and, *secondly*, if both prove genuine, as to whether the defendant has or has not taken the property subject to the plaintiff's lien.

41. Application for review rejected, as the petitioner was unable to show that the Court had mistaken the purport of, or drawn a wrong conclusion from, the document upon which the judgment was based.

42. Held, that when petitions of review are presented after three months, it is indispensable that the party preferring such petitions should, in the first instance, account for the delay, and that, on the delay being satisfactorily accounted for, the review should be granted only if, on a consideration of the reasons stated, the circumstances of the case appear in justice to require it.

In the present case the review has been granted without a due regard to the regulation governing such proceedings. The order of the commissioner is therefore reversed, and special appeal decreed with costs.

43. Application for review of judgment rejected, the Court, on reconsideration, seeing not the slightest reason to doubt the correctness of its former judgment.

44. Application for review rejected. The case which the plaintiff proved having been a totally different one from that set up in his plaint.

45. Application for review rejected, no new grounds for a reconsideration of the case having been shown.

46. Proof of the continued possession of debtor after the date of deeds of transfer made by him, held to be necessary to entitle creditor to seize the property for sale.

47. Application rejected as beyond time. A request for an extension to consult a barrister not complied with, as there had been ample time for such consultation.

48. Applications for review rejected.

49. Held, that it was no ground for review that certain accounts filed and accepted in the case were subsequently looked upon with suspicion by other judges in another case, between other parties, and for a different matter.

50. Application for review rejected, as, from the course of the pleadings adopted by the petitioners when the case came up for trial, the chief point to be determined was the fact whether the property in litigation was ancestral or self-acquired, while the question of the genuineness of the mortgage deed was a subordinate point which was not urged at the previous hearing. As the petitioner was unable to prove his special plea that the property was self-acquired, the Court held that the mortgagee was entitled to a share. And as the mortgagor had admitted that he had executed the mortgage bond, the Court held there were no grounds for admitting a review.

51. Application for review of judgment rejected, with costs: 1st, inasmuch as the failure of petitioners' vakeel to read to the Court evidence which the Court was ready to hear, can furnish no ground for a review; 2nd, inasmuch as petitioners are unable to show any valid reason why the documents now brought forward were not filed when the case was first before the Court; and 3rd, inasmuch as plaintiffs

failed to show, notwithstanding their admitted cause of action arose more than twelve years before the institution of the suit, that they were within the time allowed by law for the prosecution of the legal remedy ... 1595

52. Application for review rejected, as the ground now urged was not brought forward on appeal, and was in itself untenable ... 1596

53. Copy of the copy of a deed not allowed to be received in review, the non-production of the original at the hearing of the case not being accounted for ... 1597

54. Application for review rejected, as preferred beyond time ... 1688

See Revenue, Assessment of, No. 1.

„ Actions, Practice.

SALES, PRIVATE.

1. Judgment of lower court upheld. The evidence went to show that A sold an estate to B, and gave B kuboolyut of transfer, and then executed a kuboolyut as putnee lessor of a part of it in favor of C, and bestowed a portion of the putnee, by deed of gift, on his daughter. She sold her rights to D, and he to E. The daughter's possession at any time was not proved; while the transfer of sale was prior to the other transactions mentioned. B's rights and possession could not therefore be infringed ... 89

2. When the parties filed registered bills of sales executed by the same vendor, that propounded by plaintiffs, though of a date prior to that filed by the defendant, was held to be spurious, as the plaintiffs were unable to give any satisfactory proof of possession, or of payment of the consideration money ... 901

3. Held, that when a vendor had no title, a *bona fide* purchase for valuable consideration on the part of the vendee could not bar plaintiff's right to recover possession of his ancestral property ... 954

4. Order of lower court confirmed, placing in possession a *bona fide* purchaser for good consideration, as against an alleged *ikrarnamah* of the seller and his brothers to their mother, to keep her in possession during life and not to alienate ... 1080

5. The judge's finding on the evidence was correct, and confirmed accordingly ... 1081

6. In a case where the execution and genuineness of the deeds were not disputed, but the contention was that, as a special appeal was pending against the decree in favor of the party who held the deeds, and that party gave a *baznamah*, or deed of withdrawal, in that appeal, the latter had no power of alienating the property, and that thus the deeds were invalid. Held, that the decree of court in favor of the holder of the deeds gave him full power to transfer the property, and that the *baznamah* did not affect this power ... 1282

7. Subsequent sale of land to a party, without notice of a previous contract on the part of the vendor to sell to another party from whom earnest money had been received, held to be valid, unless impeachable on the ground of collusion and fraud ... 1445

SALES, PUBLIC, FOR ARREARS OF REVENUE.

See Auction Sales.

SALES IN SATISFACTION OF DECREES.

See Execution of Decrees.

SECURITY FOR COSTS.

Appeal dismissed, since the real defendant had not put in legal security in the lower court, and, from the judgment there passed, could not be entitled to appeal through agent. 282

SET-OFF.

See Rent, No. 13.

SETTLEMENT.

1. This suit relates to the liability of plaintiff, proprietor of a permanently-settled estate, to pay a fixed maintenance allowance, in addition to the sudder jumma of his estate. Judgment was given in favor of plaintiff by the lower appellate court, and in special appeal that judgment was affirmed; but good cause being shown for questioning the construction of the terms of the permanent settlement, as already adopted, review of judgment is allowed. 39

On review of the judgment in question, which had confirmed the order of the lower court, exempting an auction purchaser at revenue sale from liability to a payment to the disseised zemindar, it was found, by documents since discovered in the Board, that the incumbency was expressly imposed on the estate at the decennial settlement, and deduction made in consequence from the Government jumma, and was not merely an allowance for the then proprietor's family. 1206

2. Held, that, where a settlement has been confirmed by competent authority and the estate brought on the towjee as a permanently-settled mehal, any subsequent remission of revenue or inquiry regarding the rates of assessment does not deprive it of that character. 1458

See Revenue, Assessment of.

„ Summary Award.

SPECIAL APPEALS.

See Appeals, Special.

STAMPS.

1. Held, that where time had been given by the court to a defendant to have a document stamped, and the defendant made no delay in applying to the collector to have the proper stamp affixed, and the document duly stamped was, immediately on its return from the office of the superintendent of stamps, filed in the suit, the lower court should have accepted such document, though not filed with the answers, and have given it due consideration. 1160

2. A bond engrossed on two stamp papers, each of which was of the full value required for such a bond, was well engrossed, and it mattered not whether the signatures were on both sheets or only on one. Act XLI. of 1858 applies to the case, and the precedents of 8th December 1851 and 2nd July 1856 are inapplicable. 1619

See Appeals, Special, No. 2.

SUB-TENURES.

See Tenures, No. 1.

SUMMARY AWARDS.

1. Held that, in order to bring a proceeding within the category of an award, there must be a judicial inquiry, either more or less formal; that in the present instance the survey officer refused to enter into any inquiry at all, and the mere record of this refusal is no award, and, consequently, plaintiff, special appellant, is well within time in bringing his present suit under the general law of limitation. Case remitted to the lower court for investigation on the merits ... 365

2. Held, that a civil suit to set aside a summary decree is not simply an appeal; it is an appeal, and something more; in other words, although the issue to be tried by the civil authorities is identical with that tried before the revenue courts, the parties are not confined to the same evidence, but can add to that which was filed in the summary proceeding.

Held, also, that civil suits can be brought to reverse summary decrees either in consequence of their illegality, or of their non-conformity with justice. In the former class of cases, the legality of the summary decree is the sole point in issue. In the latter, the sole issue is on the merits, and the civil courts have only to look to the matter in issue as it is before them, and not as it was before the revenue court.

Case remitted to the judge for re-investigation with reference to the Court's remarks ... 636

3. The receipt filed in execution of a summary decree being accepted by the collector, suit in the civil court could not be brought on the ground of its alleged spuriousness ... 937

4. Held, that settlement officers are not competent to make an award as on a question of whether a title be that of a *conditional* or an *absolute* deed of sale, but must look to actual possession only ... 1135

5. Where the zemindar summarily sued one of several tenants whose names were registered in his *serishta*, for the rent due from them all, and obtained a summary award, and under such award ousted the tenants and settled the lands with a stranger, it was held that a suit, brought by those tenants who were not parties to the summary suit, to recover possession, though not brought within one year from the date of summary award, was not barred by the provisions of Section 6, Regulation VIII. 1831 ... 1498

SUMMARY SPECIAL APPEAL.

1. Case remanded, as the lower courts have decided the case on a point not properly at issue between the parties. Plaintiff claimed to have purchased a third of certain property from Nusserut Reza, alleged to be his share of an ancestral estate. The defendants denied the right of Nusserut Reza to that share, and further pleaded that the sale by Nusserut Reza to plaintiff was collusive, the deed of sale not having been executed on the date it bears. The lower courts have declared the plaintiff's deed of sale collusive, though Nusserut Reza admits that he executed it, and on this finding dismissed the suit, declaring that plaintiff had no right to bring the action. As respond-

ents, however, admit that Nusserut Reza could bring an action, and plaintiff is his acknowledged representative, it was held that the first point to be tried was the right of Nusserut Reza to any portion of the ancestral estate, his share of which he admits he has sold to the plaintiff, and not the *bona fide* nature of the sale between Nusserut Reza and plaintiff 949

2. On an objection that the Sudder Dewanny Adawlut could not hear the special appeal, as it had no jurisdiction, the principal sudder ameen having decided this case of execution of decree of the sudder ameen in the capacity of sudder ameen, (having charge of that office,) held, that this Court could always hear and decide questions of jurisdiction in admitted special appeal, even though not taken below.

Held that, by Sections 6 and 7, Act XXV. of 1837, and Section 5, Act VI. of 1843, the appeal must be looked on as one from the decision of a sudder ameen, and that there was no appeal to the Sudder Dewanny Adawlut 1416

3. Lower court held not to have refused a hearing to the petitioner, but to have decided the case against him on inferences drawn from his own acts and bearing on the merits of his claim 1683

SUPPLEMENTAL PLAINT.

See Pleadings.

SURETY.

1. The surety, having assumed the judgment debtor's responsibilities, all the property held by him up to his decease was answerable, and could not be withheld by his heirs 381

2. The liability of a treasurer's surety under security bond continues, even though he has been discharged on formal acquittance, until the accounts of the period during which he was surety have been correctly balanced.

Lower court's order correct, excepting as to the interest charged upon the surety 698

3. Held that, when personal property had been pledged as security for a debt, but without any power to sell being given to the lenders by the borrowers, in the event of the money not being repaid by a certain date, the lender was entitled to bring an action for the recovery of the money lent, and could not, as pleaded by special appellant, have sold the property pledged, and brought a suit for any balance remaining unpaid 946

4. In a case in which plaintiffs sued defendant on an agreement by defendant to be responsible for the realisation of certain monies, being profits of land from 1250 to 1255, and plaintiffs subsequently joined defendant in a suit against the gomastha of the land for balances of 1255, held, that such joining in a suit did not release defendant from the obligation of the agreement, such amount being deducted from plaintiffs' claim as they might realise by this suit 1002

5. Held that, as the decision of the lower court showed that the offer of a party to become surety for another had been accepted by the plaintiff, though such acceptance was not recorded in the petition, or formally sanctioned by any separate proceeding of the court, such

- party was responsible for the sum claimed by plaintiff. The Court, therefore, reversed their decision of 24th February 1858 ... 1016
6. Appeal dismissed, on the grounds that the sale ishtehar was duly issued, and no objection as to the officer who conducted the sale was taken in the lower court; that as both the real and personal property of the appellant was duly attached and advertised for sale, the objection that the collector in the first instance ordered appellant's personal property only to be attached was no ground for reversing the sale; and that, as the appellant was unable to show that his liability was limited by the terms of his security-bond to the property therein pledged, other property belonging to him was liable to sale, to realise any balance which had not been covered by the sale of the property pledged ... 1606
- TENURES.**
1. A surburakaree tenure, consisting of twelve villages, having been purchased by plaintiff when sold under a decree for arrears of rent under Regulation VIII. of 1835, plaintiff brought a suit to oust defendant from possession of one village, which had been assigned to him by the late surburakar.
- Held that, as the collector (lawfully or not) sold only the rights and interests of the defaulter in the surburakaree tenure, plaintiff was not competent to disturb the assignment made by the defaulter in favor of defendant ... 389
2. The collector having purchased an estate, and engaged with a shikmeedar within it, reserving right of sale of the shikmee, the tenure was a salable one within the meaning of Section 8, Regulation VIII. of 1819; but the zemindar only, and not a farmer, had power to sell the tenure. Order of the moonsiff upheld against the decision of the judge ... 638
3. The zemindar having never recognised plaintiff as his tenant answerable for the rent, nor plaintiff ever applied to him to recognise the partial transfer of the recorded tenants' rights, the zemindar was not bound to include plaintiff as a defendant in his summary suit, and justly could sell the under-tenure. Appeal rejected ... 707
4. As the tenure was not putnee, the zemindar was justified in refusing an under-tenant pottah for a fractional part of his holding ... 854
5. Where the special appellant was unable to show that the ryots, from whom he had purchased, had a right to sell their jotes without the consent of the zemindar, and had purchased subsequent to the date of the plaintiff's (respondent's) lease, it was held that the plaintiff was justified in refusing to recognise his purchase, or accepting him in the place of the former ryots ... 987
6. Held, that the consent of the zemindar is not necessary to the transfer of a share in a jote, which is in its nature transferable.
- Held, also, that the registration prescribed by Clause 8, Section 14, Regulation VII. of 1799 is for the security of the zemindar rather than for the benefit of the under-tenant, and that it applies solely to dependant talookdars; and that, as the plaintiff in this suit is only the purchaser of a jote, not a talook, the law is not applicable to his tenure, and the present action against the zemindar for the enforcement of its terms will not lie.

- Special appeals dismissed. Costs payable by each party respectively 1051
7. Held, that the sale of a dependant talook is not invalid in consequence of the non-entry of the rent payable to the zemindar in the sale lotbundee and notification prescribed by the circular order dated 17th July 1846; in other words, the rule on the point laid down in that circular is directory and not imperative.
- Special appeal rejected, with costs ... 1118
8. Order of lower court reversed; the arbitrators' award having adjudged possession as of a proprietor, without interfering with any tenant's rights, which were not before them ... 1123
9. Where the defendant pleaded a mookurree pottah, and, when that was declared to be spurious, pleads a prescriptive right from long possession, it was held that the lengthened possession of his mother and his subsequent possession on sufferance did not render him other than a ryot at will, and that the zemindar was consequently entitled to recover possession ... 1181
10. The auction-purchaser under Act VIII. of 1835 would have had power to cancel sub-leases of the defaulter, had he been able to show that the sub-tenures created were of the kind intended in Regulation VIII. of 1810, and capable of sale for arrears of rent ... 1176
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12. An auction-purchaser of a talook separated from a pergunnah, after a lapse of twelve years, (the limitation being saved by the intervention of the Doorga-poojah holidays,) sued for four kismuts as belonging to his talook, assigning no satisfactory reason for the delay, and producing no other proof than a copy of an unauthenticated quinquennial register, and, though he had received possession of the talook through an ameen, not appearing to have advanced any such claim then or at any time before this suit for these kismuts. Under the circumstances, the Court would not disturb the possession of the defendants, and reversed, with costs, the decree which the plaintiff had obtained from the lower court ... 1350

VALUATION OF SUITS.

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See Guardian and Ward.

WASILAT.

1. Suit for wasilat accruing during pendency of a former suit. Claim held not be barred by C. O. of 11th January 1839, as plaintiff could not sue before a particular assignment in his favor. Another plea in bar, that plaintiff could not sue in the life-time of the party who made the

assignment, for she had previously parted with her rights, overruled for the reasons stated. Defendants' statement of wasilat, in absence of proof of the amount by plaintiff, accepted. Poojah expenses allowed in account.

48

2. Plaintiff sued for possession of 87. 34., and for the correction of ghittas regarding 2 kanes, by which they, instead of being entered as a portion of his talook Hureerampore, have been made to form a portion of Ram Dass, though settled with him by the zemindar of turuf Joynarain Ghosal as a portion of Hureerampore.

The defendant pleaded, that the land in dispute was a portion of talook Ram Dass, and that it was settled with him as such by the collector, when the estate of Joynarain Ghosal was under the Court of Wards.

The principal sudder ameen dismissed the case, inasmuch as the collector having settled the land as a portion of turuf Ram Dass, the fact cannot now be questioned.

Held, that it was incumbent on the principal sudder ameen to inquire whether plaintiff is of right entitled to the land as sued for by him, as the mere act of the collector, acting as agent of the Court of Wards, could not alone be decisive of the relative rights of the parties to the suit.

Case remitted to the principal sudder ameen, with directions that he re-investigate the case irrespective of the act of the collector, and looking only to evidence of right, both documentary and oral, filed by both parties.

78

3. Objection taken to liability for wasilat in execution of a decree held not to apply, as the wasilat in question refers to the period subsequent to the decree.

Held, also, that the amount of wasilat due could not be determined by the amount realised, but by the rate leviable, as the land was occupied by petitioners' servants.

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4. Held, that the inquiry of the principal sudder ameen as to the amount of wasilat due to plaintiff is defective. As, however, the plaintiff has consented to give up his wasilat altogether, the order of the lower court, so far as it decrees wasilat, is reversed, with costs in proportion to the amount decreed.

122

5. Judgment of lower court modified as far as it limited the rate at which wasilat should be realised, before local inquiry had been made.

936

6. Held, that it is no sufficient ground for refusing a party meane profits that he had not, in the course of the suit, proved the exact amount due to him. The plaintiff's right to meane profits during the period of his dispossession having been established, the amount must be ascertained in execution of the decree.

1229

7. Former decree amended by granting wasilat, no cause being shown why such wasilat should not be given in a decree for possession.

1568

WILL.

1. This suit was nonsuited by the zillah judge, on the ground that it was not competent to plaintiff, as deviser, to sue to establish her own will in her life-time. But associated with the so-called deviser were the parties in whose favor her deed was executed, as plaintiffs ;

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- Held in special appeal, that the sole issue to be tried in this action was the validity of the execution sale; that the zemindar could not be required to plead to this issue; and that his possession of the land, as asserted, could not be prejudiced by a decision made in his absence* ... 24
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- Held that the answer of Mr. French in another suit, which had not been decided, could not be considered as legal evidence against defendant, till the averments contained therein had been adopted by the court.*
- Held, further, that, as defendant succeeded Mr. Dunlop as proprietor of the concern, and was, as far as the plaintiffs could be expected to know, the representative of Mr. Dunlop, no information of the private arrangements made by the executors of Mr. Dunlop having been made to plaintiffs, in whose books Mr. Dunlop's name still continued to be registered as putneedar, the plaintiffs were right in making the demand of the whole rent from him; that, as he had previously filed a petition claiming possession of the whole putnee, and declaring himself liable for the rent, he must, from it and other evidence adduced by the plaintiffs, be considered liable for the whole rent; that it was for defendant, who advanced the plea, to prove separate use and occupation; and that if he wished to have his liability limited, he should apply to the zemindars to have his name properly registered* ... 33
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Kaleepersad Roy Chowdree v. Kishenindur Chowdree.

This suit relates to the liability of plaintiff, proprietor of a permanently-settled estate, to pay a fixed maintenance allowance, in addition to the sudder jumma of his estate. Judgment was given in favor of plaintiff by the lower appellate court, and in special appeal that judgment was affirmed; but good cause being shown for questioning the construction of the terms of the permanent settlement, as already adopted, review of judgment is allowed ... 39

Rosal Tewaree v. Musst. Mukbool Fatima and others.

Appeal dismissed on the evidence and probabilities of the case. Decision of the zillah court showed the seal on the pottah and receipt pleaded to have been at the command of a dependent who abused the power it gave him. The lease was of an unusually long period, and on most favorable terms. No dispossession had formed the subject of complaint, and this suit was brought more than ten years after alleged dispossession ... 40

Juggernath Tewaree v. Sheikh Imdad Ali.

Suit by a proprietor of a permanently-settled estate to recover land belonging to that estate, which was declared by defendant to be lakhiraj, was adjudged in plaintiff's favor upon the strength of a statement made by defendant in a resumption suit, that he paid rent under the estate to the zemindar; but it is held in appeal that this statement is not conclusive against defendant, and that the statement, possibly untrue, does not create a title in favor of plaintiff. Accordingly the case is remanded to be disposed of on its merits ... 43

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Suit for vasilat accruing during pendency of a former suit. Claim held not to be barred by C. O. of 11th January 1839, as plaintiff could not sue before a particular assignment in his favor. Another plea in bar, that plaintiff could not sue in the life-time of the party who made the assignment, for she had previously parted with her rights, overruled for the reasons stated. Defendants' statement of vasilat, in absence of proof of the amount by plaintiff, accepted. Poojah expenses allowed in account ... 48

Lukheemonee Mchuntee Thakooranee v. Kheterpyra and Russikanund Mohunt Thakoor and others.

Where two brothers, A. and B., joint possessors, made over to C. possession of certain lands on consideration of his paying off their debt to D., it was not

competent to C., or to B.'s heirs, under the circumstances of the case, to hold A.'s widow answerable to a further extent than one-half of the liabilities incurred by A. and B., nor to deprive her of her share in the lands on account of liabilities created by B. himself over and above the joint act of himself and brother

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Mr. R. Solano v. Musst. Roop Kooar.

This suit was instituted to recover possession of a share of a village which had been leased to plaintiff for eight years, in consideration of a cash advance, and from which the lessor, defendant, had ousted plaintiff, on an arrear of rent being decreed to be due.

Held, that lessor, defendant, with reference to Clause 4, Section XVIII. Regulation VIII. of 1819, was competent to oust the lessee, and that, as a distinct provision is made in the lease, that, in the event of the dispossession of the lessor, his advance should be repaid from other sources, the lease of plaintiff was not irrevocable

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Kalee Kishen Roy Chowdree and Oomakunt Roy Chowdree v. Chundurkant Mookerjee and others.

In a suit by a zemindar for enhancement of the rent of a dependent talook possessed by defendants, appellants, it was held by the Court unanimously, that the service of notice by the plaintiff had been proved, and that the defendants had failed to establish the validity of the deeds under which they professed to hold the land at a guaranteed rate of assessment. But with respect to the enhanced assessment to be imposed, it was determined by a majority of the Court, that the case should be remanded to the principal sudder ameen for complete enquiry upon that point; and also, with the instruction that, as the plaintiff held a neemousut talook under defendants, to the extent of one-third of their talook, the rent chargeable to defendants upon that land should be reckoned as a set-off for rent payable by plaintiff to them, leaving defendants to their own remedy for any higher rate that may be due by plaintiff to them

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Greeschunder Sen Paramanick v. Ramgopal Bhadoree and others.

Held, that when the pleas of a party, originally an objector, are considered in drawing up the issues, and evidence is produced by him in support of those pleas, the objector has accepted the character of a defendant, and has exercised all the privileges of one: he cannot, therefore, subsequently raise any formal objection grounded on his original position, which, by his own act and acquiescence, has been cured. The plea, therefore, raised in special appeal on this ground, is of no validity, and the special appeal is dismissed, with costs

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Both special appeals dismissed, the one because the facts upon which the pleas taken in special appeal were based were not established, and the other because the land in suit was within the land forming the subject of the former suit

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Brijkishore Singh v. Guddadhur Banerjee and others.

Held, that Section II. of Act XLI. of 1858 makes all documents of the nature therein specified, which were executed before its enactment though informal as the law stood at the time of their execution, hereafter admissible in any court; that Section III. of the same law enacts that, in cases in which documents of the same nature have been before the courts, and rejected on the ground that they were insufficiently stamped, a review of judgment may be had if the application be made within six months from the passing of the Act, and if the court to which the application is made be satisfied that the deed, if admitted, would have led to a different decision

on the merits of the case; and that Section IV. of the Act limits the operation of Section III. to six years, from the date of final decision of the court, which might have looked, or did look, as the case may be, into the merits of the case.

Held, also, that Section II., as it stands, in no way declares that deeds of the nature alluded to in the Act have been valid, so that judgments correctly passed before the passing of the Act, grounded on their invalidity, are liable to reversal in special appeal.

Held, moreover, that as the decisions passed by the lower courts were correct, those decisions must be upheld in special appeal, and the special appeal must be dismissed, with costs; and it will remain for special appellant to make application to the highest court, which had power to enquire into the merits of his suit, for review of judgment, and the court, in granting or refusing the application, will be governed by the terms of Section III. of the law above cited ... 70

Sheik Abdoollah v. Mahytee Beebee.

Held, that a person, when bringing his suit, must act up to the law of procedure then in force, and no subsequent rescission of the previous practice can give a plaintiff power to revive a claim, which, under the practice in force when the suit was originally instituted, as it was not included in the plaint, must be considered to have been relinquished.

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Mohunt Deb Raj Dass v. Mohunt Salgram Dass.

Held, that a suit for declaration of title to rents, and for rent against the same party, does not subject plaintiff to be nonsuited ... 75

Goursoonder Roy v. Kallachund Dutt and others.

Case remanded, in order that the principal sudder ameen may re-investigate the case, looking to the entirety of the evidence produced by the defendant, as well as that filed by the plaintiff, which he has not done, and pass whatever order may eventually seem just and proper ... 77

Khoondkar Abdoollah v. Burhan Kulal and the Collector.

Plaintiff sued for possession of 8g. 3k., and for the correction of chittas regarding 2 kanes, by which they, instead of being entered as a portion of his talook Hureerampore, have been made to form a portion of Ram Dass, though settled with him by the zemindar of turuf Joynarain Ghosal as a portion of Hureerampore.

The defendant pleaded, that the land in dispute was a portion of talook Ram Dass, and that it was settled with him as such by the collector, when the estate of Joynarain Ghosal was under the Court of Wards.

The principal sudder ameen dismissed the case, inasmuch as the collector, having settled the land as a portion of turuf Ram Dass, the fact cannot now be questioned.

Held, that it was incumbent on the principal sudder ameen to enquire whether plaintiff is of right entitled to the land as sued for by him, as the mere act of the collector, acting as agent of the Court of Wards, could not alone be decisive of the relative rights of the parties to the suit.

Case remitted to the principal sudder ameen, with directions that he re-investigate the case irrespective of the act of the collector, and looking only to the evidence of right, both documentary and oral, filed by both parties ... 78

Kashee Thakoor v. Baboo Lall Jha and Khedun Lall and others.

Special appeal dismissed, as, on reference to the record, it was found that the special appellant had, in the lower court, brought forward no evidence to sustain the allegation on which the special appeal had been admitted ... 80

Hurrischunder Roy Chowdree v. Poornee Beebee and others.

Hurromohun Banerjee v. Musst. Poornee Beebee and others.

Plaintiff sued to recover from defendants, his co-sharers, revenue paid on their account. The judge held that defendants were not only out of possession, but kept out of possession by plaintiff. Special appeals accordingly dismissed ... 81

Syud Ahmed Reza and others v. Rajah Enayet Hossein.

Plaintiff A. alleged that he paid the arrears of revenue due on a joint estate, and thus saved it from sale. He then sued for the recovery of the money, and got a decree, jointly and severally, against B., C., D., E., and his co-sharers. This decree provided that the person of E. was not to be liable, as she was not in possession, but that her malikana in the collectorate was to be taken by the decree-holder. E. was, however, found to have no malikana in deposit. In the mean time B. and C. got a decree against plaintiff A. At their request, their judgment debt to A. was adjusted by a credit to them with A. of their decree against A. B. and C. then got an acquittance from A. for their original shares. In making this adjustment, the zillah judge apportioned a certain sum as due to A. on his decree on account of E.'s share. A., alleging that B. and C. had possession of E.'s share, sued them for the sum so apportioned.

B. and C. pleaded that the whole case had been disposed of by the judge's order, adjusting A.'s decree against them by crediting A. with the sum of their decree against him, and that A.'s remedy was by appeal from that order, or by revival of execution, and that this suit would not lie; and, further, they had never held E.'s share.

The principal sudder ameen held that B. and C. did hold E.'s share; that they were responsible to A. for the amount apportioned by the judge as for E.'s share; and that the accounts showed that A. (plaintiff) had collected less than his co-sharers.

B. and C. appealed, urging that A. (plaintiff) should have revived execution, or appealed from the judge's order of separate apportionment on account of E.'s share; that plaintiff's alleged advance was a personal debt separately due by those for whose respective interests it was made; that the apportionment referred only to the malikana of one year, and not to the share in the estate now sued for; and that appellants never held E.'s share or more than their own.

Held by a majority, that the original decree being a joint and several one, the acquittance pleaded by B. and C. could only affect their original shares, and not be a general release, and that acquittance was only the result of the particular mode of adjustment sought by B. and C. themselves.

Held also, that the plaintiff was not wrong in suing as he has, instead of proceeding by revival of execution or appeal from the order of apportionment, because it was the court itself which indicated, by such order, the manner of proceeding, and wrongly made that apportionment, when the decree was clearly one against B., C., D., and E., jointly and severally, with a reservation only as to E.'s person, and thus plaintiff could sue for what remained unsatisfied of his decree.

Appeal dismissed ... 82

Joykishen Mookerjee v. Musst. Bhagiruthee Dassce and others.

Judgment of lower court upheld. The evidence went to show that A. sold an estate to B., and gave B. kuboolyut of transfer, and then executed

- a kuboonlyut as putnee lessor of a part of it in favor of C., and bestowed a portion of the putnee, by deed of gift, on his daughter. She sold her rights to D., and he to E. The daughter's possession at any time was not proved; while the transfer of sale was prior to the other transactions mentioned. B.'s rights and possession could not therefore be infringed* ... 89
- Musst. Prosunnokalee Debea v. Mr. Robert Molloy and others.**
Order of the judge dated 7th December 1858 cancelled, inasmuch as it was not in consonance with the order of this Court dated 9th October 1858, directing the immediate release of the property belonging to petitioner from attachment ... 95
- Brijonath Majoondar and others v. Gobindmonee Dassee.**
This case relates to an application made by the widow of Bishonath Majoondar to execute a decree made in his favor in Rajshahye, the application being opposed by petitioners acting under a will propounded in Bungpore. The zillah judge's decision being confined to his opinion of the widow being the natural guardian of her son, does not involve her right to act as manager of her husband's estate; and the matter is accordingly remanded to the judge for re-consideration ... 96
- Mr. Edward Browne v. Mr. A. D'Silva.**
An order for costs was made in favor of petitioner in the miscellaneous department; but the proceedings furnish no means for estimating the amount of costs, and as the petitioners failed to ask for a specific order at the first hearing, this application is dismissed ... 98
- Baboo Gobind Singh and others v. Musst. Bhoolunbuttee.**
This suit was nonsuited by the zillah judge, on the ground that it was not competent to plaintiff, as deviser, to sue to establish her own will in her life-time. But associated with the so-called deviser, were the parties in whose favor her deed was executed, as plaintiffs; and as the declared object of the action was to bring to an issue the power of appointment, asserted by the deviser, under the authority of her deceased husband, it was held that the action would lie ... 99
- Eshanchunder Acharj Chowdree and others v. Bimola Debea Chowdranee and others.**
Objection taken to liability for wasilat in execution of a decree held not to apply, as the wasilat in question refers to the period subsequent to the decree.
Held, also, that the amount of wasilat due could not be determined by the amount realised, but by the rate leviable, as the land was occupied by petitioners' servants ... 101
- Radhachurn Photedar and others v. Moulvee Abdool Alea.**
Held, that the effect of an attachment under Regulation II. of 1806, pendente lite, entitles the decree-holder to a preference on the proceeds of the sale of the property attached, over a party who acquired a mortgage on the same after attachment ... 102
- Modhoosoodun Roy v. Bhyrochunder Kyal.**
Order made by the zillah judge under Regulation XXVII. of 1806 being founded on the presumption known from the evidence of plaintiff, that defendant meant to dispose of his property, so as to defeat the eventual judgment, is affirmed ... 103
- Kalachand Ghose and Modhoosoodun Bose v. Ramnarain Mookerjee and others.**
An appeal will lie from an interlocutory order of a zillah judge refusing to receive an answer from a defendant in a pending suit.
An answer is admissible beyond the due period, on cause shown ... 105

DECISIONS
OF THE
SUDDER DEWANNY ADALUT,
RECORDED
IN CONFORMITY WITH ACT XII. 1843.

THE 3RD JANUARY 1859.

B. J. COLVIN, ESQ., Judge, and G. LOCH, ESQ., Officiating Judge.
Case No. 902 of 1858.

Application for Special Appeal from the decision of Syud Ahmed Buksh, Principal Sudder Ameen of Mymensing, dated 15th March 1858, affirming that of Baboo Nundkoomar Bose, Moonsiff of Chowkee Bazeetpore, dated 29th December 1856, in the case of

Kishen Mohun Kyburt and others, *Plaintiffs,*
versus

Mr. W. G. Nicose Pogose and another, *Defendants,* Petitioners.
Baboo Jugdanund Mookerjee and Moulvee Ahmed Ali, for
Petitioners, Ex-parte.

It is hereby certified that the application is granted on the following grounds:—

This suit was remanded for re-trial on 12th December 1857, page 1821 of the Decisions, on the petition of the plaintiffs, Kishen Mohun Kyburt and others. The plaintiffs sued to recover, with damages, the sum of Rupees 4, illegally exacted from them by the defendants as rent on their fishing nets. The moonsiff held that plaintiffs were under no agreement to pay such rent to the defendants, and that the money had been taken by force, and gave a decree for the plaintiff to recover the amount collected. On appeal, the principal sudder ameen, finding that in the Government khas mehals nets were variously assessed, and rents paid, dismissed the suit. Plaintiffs came up in special appeal, on the plea that, though the fishing nets referred to by the principal sudder ameen, viz. the Government khas mehals, were assessed, yet the principal sudder ameen had not shown that "the plaintiffs, for any specific sum, at or from any certain time, were liable for rent to the

Case remanded for re-trial, as the decision and circular order quoted by the lower court are not applicable. It was held also that the point to be determined was, whether the defendants had been accustomed to collect rent from the plaintiffs and other fishermen, without taking kuboolyuts from them; for if they had, the absence of a kuboolyut would

be no bar to defendants, and that he had failed to try the question of force." The Court considered the decision defective, and remanded it with this order :—"If he (the principal sudder ameen) means to determine that the plaintiffs paid a certain amount of rents to defendants, and that the sum sued for represented his liabilities legally levied, he should say so."

The principal sudder ameen has now dismissed the appeal of the defendants, and confirmed the order of the lower court, with reference to a decision of this Court, dated 19th June 1856, page 530 of the Decisions, in the case of Anuntoram Kyburt *versus* Collector of Mymensing, and a circular letter of the Board of Revenue, dated 27th August 1856.

Defendant, petitioner, now appeals on the ground that the principal sudder ameen should have disposed of the suit on its merits, and not with reference to the decision and circular quoted, which are not applicable to the present case, but only to Government khas mehals.

We think the principal sudder ameen has misapplied the decision and circular order, quoted by him in his decision now appealed from. In the present suit the defendants claim a right as zemindars to realise rent from fishermen fishing in the julkurs appertaining to their estate; and the question for decision is, whether they have previously received rent from the plaintiffs in the manner alleged, or are entitled to recover the amount now in litigation. If, therefore, the present demand be customary, and the defendants have heretofore realised rents without taking kuboolyuts from the fishermen, the mere absence of a kuboolyut will not bar their right to recover from the plaintiffs; and as the decision and circular quoted by the principal sudder ameen relate only to Government khas mehals, they are inapplicable to the present case.

We remand the case, to be disposed of with reference to the above remarks.

THE 4TH JANUARY 1859.

H. T. RAIKES and A. SCONCE, Esqs., Judges, and H. V. BAYLEY, Esq., Officiating Judge.

Case No. 480 of 1856.

Regular Appeal from the decision of Moulvee Itrut Hossein Khan, Principal Sudder Ameen of Rungpore, dated 23rd June 1856.

Baboo Prosonnocomar Tagore and others, (Plaintiffs,) *Appellants,*
versus

Raj Lukhee Chowdrain and others, (Defendants,) *Respondents.*
Baboo Ramapersad Roy and Kishenkishore Ghose and Moonshee Ameer Ali, for Appellants.
Baboo Shumbhoonath Pundit, Dwarkanath Mitter, and Unno-dapersad Banerjee, and Mr. R. T. Allan, for Respondents.

Suit laid at Company's Rupees 8,000.

PLAINTIFFS seek to recover possession by this suit of 1,600 beegahs of land, as belonging to their village of Gopalnuggur, of which they were dispossessed by the defendants, the zemindars and dependant talookdars of Pergunnah Sheerpore, an estate in the neighboring district of Mymensing.

The defendants deny the right of plaintiffs to the land as part of their village, deny also the alleged dispossession, and assert that the lands belong to their villages, called Burrah Chur and Kowleah Chur, as bheel bhuratee lands.

The principal sudder ameen held that the plaintiffs had not established the dispossession pleaded by them, nor previous occupancy through the ryots whose kuboolyuts were produced; the dates of these documents only running from 1246 to 1254, some of them consequently relating to a time after plaintiffs alleged themselves to have been put out of possession of the lands.

The principal sudder ameen also decided that the road, which plaintiffs alleged had always formed the boundary between their estate and that of the defendants, was not proved to form such boundary; and plaintiffs' case therefore failing on all the different points assumed by him, he dismissed the claim.

Baboo Kishenkishore Ghose, on the part of the appellants, takes exception to the finding of the court below on the evidence, because it rejected entirely the reports of an ameen and of the peshkar of the lower court, who were deputed to make local enquiries regarding the lands and reported in favor of the plaintiffs' claim; while for no ostensible reason the principal sudder ameen ordered a third enquiry to be made, and deputed the serishtadar of

In a suit for recovery of land, plaintiffs, appellants, having upon the evidence failed to prove their case, the order of dismissal made in lower court was affirmed in appeal.

his court to conduct it, and gave the preference to this report, which was entirely on the side of the defendants. The pleader argued that if a third report was deemed necessary, the principal sudder ameen should have gone there himself, or should have sent a moonsiff, and not entrusted the investigation to an omlah of his court. The pleaders then showed us the kuboolyuts of several ryots; but only five of these documents were attested by the parties who had executed them. These five kuboolyuts aggregated some 30 beegahs of land, and purported to have been executed in 1246. We were told that these same individual ryots had cultivated the lands for some years previous to that date, but as the lands were recently formed, and their permanency at first doubtful, the ryots had not consented to take them under engagements until the year indicated, when they were regularly brought under assessment; that the lands have formed from the drying up of a jheel, the julkur of which, the witnesses deposed, belonged to the plaintiffs, and consequently the lands now occupying its site were rightly within the plaintiffs' estate; that the boundary which divides plaintiffs' estate from the defendants' was constituted by a road running between them in the direction of the hills; that a document dated in 1820, which was deposited in the court of the Government officer who administered the duties of Pergunnah Sheerpore, afterwards transferred to Bograh, was withdrawn by the defendants, as shown by copy of an order filed on the record by the plaintiffs; that if this document had been produced, it would have afforded proof of the road being the proper boundary between the two estates. Such boundary gives the plaintiffs the entire lands in dispute as part of the zemindaree.

JUDGMENT.

We have not deemed it necessary to call upon the respondents to reply.

The only documentary evidence adduced by the plaintiffs is represented by the kupoolyuts of certain ryots, who are alleged to have entered into engagements with plaintiffs for some part of the lands in dispute. Of these kuboolyuts, however, only five have been attested, and the quantity of land, aggregating only some thirty beegahs, is quite insufficient to establish the claim of the plaintiffs to 1,600 beegahs, or to allow of the Court's deducing from these documents any inference in favor of plaintiffs' claim. They are, moreover, dated in 1246, only a year previous to the alleged dispossession, and taking the fact of their execution on the date named as established, it leads to the inference that, as soon as the defendants were aware of plaintiffs' taking such engagements, they at once successfully asserted their own rights in 1247, and plaintiffs fail to account in any way for their having allowed defendants to keep undisputed possession for a period of nearly twelve years.

The evidence, then, on the part of the plaintiffs, amounts to this, that their witnesses assert they collected certain julkur rents up to 1234 or 1235, the accounts of which are not before us; that the jheel then began to dry up, and plaintiffs encouraged their ryots to cultivate the lands, and received rent from them; that in 1245 B. S. the lands were considered ripe for permanent settlement, and five ryots attest their kuboolyuts, aggregating about 30 beegahs, but were not permitted to retain their occupancy, as the defendants drove them off the lands as soon as they commenced to cultivate them in the following year. After that dispossession, the plaintiffs took no steps to recover possession until the institution of the present action, after the lapse of nearly twelve years. This evidence establishes neither proof nor probabilities in support of the plaintiffs' case, and as the reports of the ameen and the peshkar cannot be held to be conclusive in themselves, and plaintiffs have no documentary evidence of the existence of any settled boundary to support their averments on that point, we hold them to have completely failed in setting before the Court any reliable grounds for our interference; and we therefore confirm the judgment passed below, with costs of the appeal on the plaintiffs.

THE 4TH JANUARY 1859.

B. J. COLVIN, Esq., Judge, and G. LOCH, Esq., Officiating Judge.

Petition No. 1371 of 1858.

Application for Special Appeal from the decision of Mr. T. A. Glover, Officiating Judge of Rungpore, dated 3rd July 1858, affirming that of Baboo Sarodapersad Biswas, Moon-siff of Budergunge, dated 18th March 1858, in the case of

Tooree Beebee and others, *Plaintiffs,*

versus

Nuzzer Mahomed and another, *Defendants, Petitioners.*

Baboo Mohendrolal Some, for Petitioners.

Syud Murhumut Hossein, for the Opposite Party.

SPECIAL respondents sued petitioners to recover possession of certain landed property, on the allegation that it had been mortgaged to petitioners for eleven years, from 1245 to 1255, at the end of which time the debt, it was considered, would be discharged from the usufruct, but possession was not restored to special respondents.

The answer was, that the transaction was one of absolute sale, and as petitioners had been in possession of the property in dispute for eighteen years, the suit was barred by the statute of limitations.

The judge held that the transaction was presumptively one of mortgage, so that the plea of limitation did not bar the claim; and as the original rights of the special respondents in the land had not

Case remanded for account to be taken between plaintiff, mortgagor, and defendants, mortgagees, agreeably to Section XI. Regulation XV. of 1798.

been denied by petitioners, he cast upon them the burden of proof of their special plea of an absolute sale, and on the plea not being established by petitioners, he rejected it. Treating the case, therefore, as one of mortgage, he considered, from the special respondents' estimate of the produce of the land, that the debt had been discharged, and decreed immediate possession to them.

It is urged in special appeal that, as the special respondents had been out of possession for above twelve years, the burden of proof should have been thrown upon them, to show that it was a case of mortgage rendering the plea founded upon limitation inapplicable. But we do not admit this plea. It might have been a good one, had the suit not been instituted within twelve years from 1255; but as it was brought in time, reckoning from that date, it was for petitioners, who set up the plea of limitation, to establish the fact of absolute sale, otherwise the plea could be of no effect.

Another plea is, that the judge is wrong in estimating the produce by special respondents' statement. On this point we are of opinion, that when the judge had decided the case to be one of mortgage, he should then have conformed to the rules of Section XI. Regulation XV. of 1793, and called for accounts from petitioners, whom he regarded in the light of usufructuary mortgagees. We therefore reverse the judge's order, awarding immediate possession to special respondents, and remand the case, that he may pass a fresh order on it, after taking the account according to the above law.

THE 5TH JANUARY 1859.

B. J. COLVIN, Esq., Judge, and C. B. TREVOR and G. LOCH, Esqs.,
Officiating Judges.

Case No. 433 of 1858.

Special Appeal from the decision of Baboo Nobinkishen Paulit, Principal Sudder Ameen of Chittagong, dated 14th December 1857, reversing a decree of Moulvee Syud Ahmed, Moonsiff of Puttea, dated 18th December 1856.

Parbuttee Churn Biswas, (one of the Defendants,) Appellant,
versus

Tarinee Churn Biswas, (Plaintiff,) and Gouree Churn, (Defendant,)
Respondents.

Baboo Kishensukha Mookerjee, for Appellant, Ex-parte.

Case remanded to the lower appellate court for re-consideration on account of previous incomplete investigation.

THIS case was admitted to special appeal on the 14th July 1858, under the following certificate recorded by Messrs. C. B. Trevor and H. V. Bayley:—

“Plaintiff sued defendants to recover Rupees 40, which plaintiff alleged had been sent by him to defendants with a view to stay a sale of plaintiff's property in execution. Plaintiff avers that defendants

did not stay the sale, but that it took place; that the property was purchased by defendants in their own name; and that defendants did not pay the purchase-money and complete the sale.

"Defendants admit the receipt of the above Rupees 40, but allege that, as the judgment was for Rupees 48, he could not stay the sale by paying in the Rupees 40, and that his only resource to aid plaintiff's object was to buy the property in his own name and pay in the earnest-money (Rupees 15,) which he did out of the Rupees 40, sent by the plaintiff, and that he paid the balance of the Rupees 25 in satisfaction of other decrees against plaintiff.

"The moonsiff found that plaintiff's object was to stay the sale; that the debt being for Rupees 48, and plaintiff having sent Rupees 40 only to defendants, defendants had adopted the best means they could to carry out that object by purchasing the property and paying the Rupees 15 as earnest-money; that defendants had acquainted plaintiff that, to complete the sale, Rupees 81, the balance of the purchase-money, had to be provided, and that the Rupees 25, balance of the Rupees 40, sent by plaintiff, had been paid by defendant on plaintiff's account, in satisfaction of other decrees against plaintiff.

"The principal sudder ameen, on appeal, did not state his opinion on the facts found by the moonsiff, or on the reasoning of the decision of that officer, but declared that the defendants had bought the property sold in their own name, and had not deposited the money sent by plaintiff to stay the sale (not noticing that it was Rupees 8 less than the amount due and necessary to be deposited as found by the moonsiff.) The principal sudder ameen added that he suspected fraud throughout, and that defendant, being a vakeel of the moonsiffs' court, had abused the trust reposed in him, and was liable to be proceeded against under Act XIII. of 1852.

"The defendant appeals specially against the principal sudder ameen's decision, urging—

"*Firstly*,—It has not gone into the facts and reasoning in the moonsiff's judgment, but rests on conjecture and the principal sudder ameen's own opinions and suspicions.

"*Secondly*,—That the principal sudder ameen's remarks on defendant's character as a vakeel are quite erroneous, because defendant acted only as a private party, and not as a vakeel, (the parties being, as stated by the moonsiff, uncle and nephew), and because no fraud is proved against him.

"We admit the special appeal to try the first point, and also whether, as defendant does not appear to have acted under any power as a vakeel, the remarks of the principal sudder ameen in this part of his decision are not surplusage and misplaced."

JUDGMENT.

This case must go back to the principal sudder ameen. That officer has given no judgment on the facts of the case as contained in the pleadings. Petitioner in his answer alleged that he paid Rupees 15 as earnest-money, with the consent of special respondent, and that he discharged other debts for him. The moonsiff found on petitioner's favor on these allegations; but the principal sudder ameen has not noticed them in his judgment. He has acknowledged the appropriation of Rupees 15 as earnest-money, but has assumed that the transaction was one of fraud on the part of petitioner, without stating the grounds of such opinion, or what there was to sustain it. Again, the principal sudder ameen has not in any way noticed the other points in the answer, nor pronounced upon petitioner's allegation that he had paid Rupees 25 for other debts due by special respondent, and had in fact advanced Rupees 24-8 on his account, which facts he refers to in proof of his good faith. The case is therefore remanded for re-consideration of the several matters shown as above to have been overlooked by the principal sudder ameen, who will pass a fresh decision with reference to the judgment he may come to thereon.

THE 10TH JANUARY 1859.

B. J. COLVIN, Esq., Judge, and D. I. MONEY and G. LOCH, Esqs., Officiating Judges.

Case No. 267 of 1857.

Petition for Review of Judgment passed by Messrs. E. A. Samuels and D. I. Money, (Mr. C. B. Trevor, dissentient,) in case No. 267 of 1857, dated 31st July 1857.

Joykishen Mookerjee, (Plaintiff,) Appellant,
versus

Unnopoorna Dasse, (Defendant,) Respondent.

Baboo Ramapersad Roy and Mr. W. Newmarch, for Appellant.
Baboo Shumbhoonath Pundit and Moonshee Ameer Ali, for Respondent.

Case remanded for inquiry into existence of asserted rent-free tenure before 1st December 1790 or not, and for application of the law of limitation according to precedents, in

THE petition for review of judgment was admitted by Mr. D. I. Money on the 4th March 1858, under the following order:—

“This is an application for a review of the judgment of the majority of the Court passed on the 31st July 1857, in the special appeal of Joykishen Mookerjee, (Plaintiff,) Appellant, versus Unnopoorna Dasse, (Defendant,) Respondent.

“Mr. Newmarch, in support of the application, has urged that this judgment is to the effect, that the general law of limitation

of twelve years applies to *all* lakhiraj tenures of whatever description, whereas the case is one of a class to which the law and the ruling cannot be applied; that the decision of the Privy Council, which has been *allowed* to over-turn the long current of decisions of the Court, is not an authoritative one, inasmuch as it does not touch private lakhiraj claims, but only Government claims; that Regulation III. of 1793 and Regulation XIX. of 1793 are the Regulations on which the decision of the present case depends, whereas the case before the Privy Council was disposed of with reference to Regulation II. of 1805, which limited the right of Government to resume by suit to sixty years; that if therefore the point now in question was not ruled in that case, it could be no authority or precedent for a case like that before us, *and ought not to be allowed to disturb the uniform current of decisions of this Court.* Mr. Newmarch cited, as supporting his argument, the following opinion of Justice Seton in the case of Sibchunder Ghose *versus* Russickchunder Neoghee, page 39 of Fulton's Reports for 1842 :—'I have always understood that the law of a country was to be found, not in the text of its code, which can never be more than the foundation of it, but in the practice which has prevailed under it, which may often be inconsistent with it, and even in some cases opposed to it,' &c. Also Bulnois' Reports, page 77, where this opinion meets with the commendation of Sir Lawrence Peel. He then proceeded to argue that the Privy Council, by their judgment, did not in reality overturn any previous current of decisions, whereas the judgment of the Court, of which a review is asked, would overrule the current of decisions of this Court from 1802 to 1848, which have pronounced the inapplicability of the twelve years' limitation to such cases; that if the point had been ruled in 1802, the consequence would have been of less moment, but the Court, having for forty-six years refused to admit the application of the statute of limitation, thereby created a law for itself, which it would be now dangerous to subvert; that subsequently to 1848 the Court has not unanimously overruled the previous decisions; that the only three cases of any importance are those to which reference has been made; that cases which might arise under Section X. Regulation XIX. of 1793 are not affected by the decision in the case of Gungadhur Banerjee; that the present claim may be one under that section, but could not be said to come under it, until assigned to its proper class; that Section X. contains the *nullum tempus* clause, as all grants made since the 1st December 1790 are declared by it to be null and void; that this section is not mentioned in the case of Gungadhur Banerjee; and that the other two cases of Kenaram Roy and Digumber Mitter support his arguments. And finally, Mr. Newmarch referred to Section VIII. Regulation IX.

reversal of previous judgment in this case.

of 1825, which he states was never noticed by the Court, and in which are the following remarkable words :—‘ Nothing contained in Regulation II. of 1819, or in any other Regulation in force, shall affect, or be considered to affect, the provisions contained in Section X. Regulation XIX. of 1793,’ &c. &c. ; that this puts out of consideration all statutes of limitation regarding claims under Section X. ; that it is true that a summary remedy is provided in this section, which empowers a landlord to dispossess the grantee of the proprietary right in the land, without application to the Court ; that where there is a right, there is a remedy, and that if a man proceed under this section by force, he could not be deprived of his remedy ; and that if the remedy was taken away from the zemindar by Act IV. of 1840, then this section gives him a right which there is no remedy to enforce ; and that, possessing the right, the remedy must be restored to enforce it. Upon all these grounds Mr. Newmarch applies for a review of judgment and for an authoritative decision of the whole Court upon the point at issue.

“ Baboo Shumbhoonath Pundit, on the other side, argued that the ruling of this Court was perfectly consistent with the law ; that it mattered not whether the lakhiraj tenure was before or after 1790 ; that in all such cases, where the zemindar elects to come into court for resumption of the lakhiraj tenure, the ordinary rules of limitation would apply, even though the tenure be one after 1790 ; that the decision of the Court should not be guided by any reference to the time of the alleged creation ; that if the zemindar finds the tenure to have been created subsequent to 1790, he has the power, under Section X. Regulation XIX. of 1793, to put himself in possession ; that he is not prevented from exercising his rights ; that the only restriction which the law puts upon him is to compel him to come in time, if he comes into court for redress ; that the only class likely to suffer from such restriction are those who have allowed parties to remain in possession for years, and cannot obtain possession ; and that it is but just that not having exercised their ordinary rights under Section X., they should be told, when they come into court after twelve years, that they are too late.

“ Baboo Shumbhoonath Pundit then proceeded to show the cases in which the principle of throwing upon the defendant the burden of proving his title and position, before he can plead the statute of limitation, could not possibly apply, and then argued on the application of the law of limitation in *ex-parte* cases ; that it would be absurd, if the rule should be more rigid when the plaintiff is unopposed, and less so where the defendant disputes the claim ; that if the principle of the defendant’s proving adverse possession first, before the question of limitation can be raised, is good at all, it must be good in all cases ; and that it is contrary to all rules

of evidence to compel the defendant to prove his own case to the extent of title, for he must prove more than possession before he can raise the plea of limitation.

"There is no question in this case, I think, that the possession of the lakhirajdar is an adverse possession. The points on which an authoritative decision, if possible of the whole Court, is required, are, whether a zemindar bringing an action against a lakhirajdar, under the provisions of Section X. Regulation XIX. of 1793, is subject or not to the general law of limitation, Section XIV. Regulation III. of 1793 ; also, whether, when a zemindar comes into court under the provisions of Section X. Regulation XIX. of 1793, it is not incumbent on him to set this forth expressly in his plaint, the law being a special one.

"Under Section XIX. Regulation III. of 1793, a civil court is prohibited from *hearing any suit whatever*, if the cause of action shall have arisen twelve years before any suit shall have commenced on account of it.

"Section X. Regulation XIX. of 1793 declares all grants for holding land exempt from the payment of revenue, whether above or below 100 beegahs, made after the 1st December 1790, null and void. But it also gives power to the zemindar to collect the rents from such lands, *and to dispossess the grantee of the proprietary rights, without making previous application to a court of judicature*, thereby giving him a remedy *out of court*, which he has not *in court*, if he comes into it after twelve years.

"It is argued that the *nullum tempus* clause in this section expressly bars the application of the general law of limitation, or, in other words, that a lakhirajdar so situated, before he can plead the statute of limitation, must show that he is excepted from the *nullum tempus* clause, and that his tenure existed before 1790.

"The zemindar was subjected to the general law of limitation of twelve years from the passing of Regulation III. of 1793.

"The Government right to resume was limited by Regulation II. of 1805 to sixty years. But it is remarkable that no part of that law in any way affects the general law of limitation, to which the zemindar was subjected in 1793. He is bound by it as much as ever.

"Mr. Trevor, who differed from Mr. Samuells and myself in this case, and to whose opinion I would give every weight, has cited an important part of the preamble of Regulation II. of 1805, and deduced from it a strong presumption in favor of the zemindar. The point, however, is one on which further argument might be heard.

"In this very preamble it is stated that 'the distinction between *bona-fide* possession under a title *believed* by the possessor to be *good and sufficient*, and *mala-fide* possession obtained by fraud and violence, has been taken in the Hindoo law, as in the laws of other countries, wherein long and peaceable possession is held,

and admitted to establish a *right* of possession and *property*, or at least to bar any legal claim of redress against the possessor.'

"It would seem from this preamble, and Clause 1, Section III., that it is sufficient if the *possession* for twelve years has been *honestly acquired*, or under a title *believed* by the possessor to be good, to enable him to plead the general law of limitation, and that it is *only* in cases of fraudulent, violent, or unjust acquisition that the law is not applicable.

"In Clause 2, Section III. the mode of procedure to be observed in such cases is clearly laid down. The plaintiff is bound to *set forth* distinctly in his *plaint*, or his replication, the circumstances attending the acquisition of the property by dishonest means on the part of the defendant, and if the defendant deny the allegation, the plaintiff must prove it, before the Court can determine whether the suit is cognizable under this section; and when this is determined, then the merits of the case may be entered into and tried.

"Clause 3, Section III., after declaring that no suit shall be cognizable, if the cause of action shall have arisen sixty years before its institution, further declares the Clauses 1 and 2 of Section III. to be inapplicable to any private claims to property *acquired by an insufficient title within sixty years*, if the possession has been honestly obtained, and if it has been held unmolested under a title *believed* to be just and valid during twelve years antecedent to its institution, and that all such claims shall be deemed inadmissible, *as heretofore*, after twelve years from the origin of action, unless the same be cognizable *under the exceptions or provisions already in force*.

"Then comes the 4th Clause, Section III., *providing* that no length of time shall bar the cognizance of suits in cases of mortgage and deposit, nor *in any other case whatever*, wherein the *possession* shall not have been under a title *bona-fide believed* to have conveyed a right of property to the possessor.

"Now, taking the context of the clauses of Section III. Regulation II. of 1805, with the intent of its preamble, it would certainly seem that, notwithstanding the *nullum tempus* clause in Section X. Regulation XIX. of 1793, the general law of limitation is untouched by that clause, or by any subsequent law, and hangs over the zemindar in full force; and that when he brings an action like this after twelve years against the lakhirajdar, under the provisions of that section, he is out of court, and cannot be *heard*, unless in his *plaint* he *expressly sets forth* that the *possession* of the property has been *dishonestly* acquired on the part of the defendant, when, under the provisions of Clauses 1 and 2, Section III. Regulation II. of 1805, if the allegation is denied by the defendant, the plaintiff must prove it to enable the court to decide whether the suit can be brought under that section and the claim be tried.

"It appears to me that against the general law of limitation there is no special prescription, except under the above clauses, when *dishonest acquisition* of the property must be expressly alleged and clearly proved before the plaintiff's claim can be tried, and that he has no other remedy in court.

"To look, then, at the defendant's title, whether it is before or after 1790, which is looking at something *more than possession*, and therefore more than even in the exceptional cases the law prescribes, is opposed, I think, to the principle on which the law of limitation is founded, and the legal procedure under which, when the plea of limitation is urged, that plea should be tried.

"After attentively re-considering the judgment delivered by Mr. Samuells and myself in this case, the precedents of the Court referred to in it, and the law bearing upon the points noticed, and after giving due weight to the arguments advanced by Mr. Newmarch in support of his application for a review, although I am still of opinion that the remarks of the judges, in the case of Digumber Mitter, were beside the question and extra-judicial—still, as the decision of the Court in the case of Gungadhur Banerjee appears to have had special reference to the class of cases described in Section VI. Regulation XIX. of 1793, and the point before us, as involved in the provisions of Section X. Regulation XIX. of 1793, was not then distinctly ruled, although the general principle upon which it was based would seem to apply equally to it—upon this ground, and with reference to the very great importance of the subject, I admit the review, in order that the point may be tried and determined before the Court at large, and an authoritative judgment given upon it."

JUDGMENT.

Messrs. B. J. Colvin and G. Loch.—This case has come before the Court in consequence of its restoration to the file by Mr. Money's admission of the application for review of judgment on the 4th March last. The majority of the Court held, on the 31st July 1857, that plaintiff's suit was barred by the law of limitation, so that defendant's case did not require to be looked at. This opinion, professed to be based upon the ruling in the case of Gungadhur Banerjee, decided on the 10th September 1855, ruling that the law of limitation applies to suits for resumption of alleged rent-free tenures brought by zemindars, not auction purchasers, and upon the principle of the Indian law of limitation, which, without giving the defendants a prescriptive title, except in exceptional cases, bars the remedy or extinguishes the right of the plaintiff. Later decisions, in the cases of Kenaram Roy, dated the 22nd May 1856, and of Digumber Mitter, dated the 24th July 1856, were disregarded, as the former was considered to be opposed to the above

decision of the 10th September 1855, and the latter was looked upon in the light of an extra-judicial *dictum*. The principle laid down in the two cases of 1856 was that, to constitute the plea of limitation a valid one, it was necessary for defendant to show a *bond-fide* rent-free tenure, covered by a lakhiraj grant, and in existence previous to the 1st December 1790, otherwise the plea would not avail him.

It has been argued for plaintiff, petitioner, that it is evident from the course of legislation on the subject of lakhiraj holdings, that it was not the intention to stop claims for resumption by zemindars, on the expiration of twelve years from 1793; and the words of Section XIX. Regulation VIII. 1800, directing, after a certain date, the assessment of unregistered lands found to be exempt from the payment of revenue, are referred to as showing that no provision was made for saving those which had been held rent-free for twelve years previous to the proposed subjection to assessment; so that a prescriptive tilte could not be created merely by delay in preferring the claim to assess. It has also been contended, that the decision of the 10th September 1855 should be confined to cases coming under Section VI. Regulation XIX. of 1793, *i. e.* to grants made before 1st December 1790, so that until the existence of the tenure now in suit, before that date, be proved, the application of the principle of the decision should not be made.

On the other hand, it has been submitted that this suit for resumption has been instituted under Section XXX. Regulation II. of 1819, which is an acknowledgment by plaintiff that the tenure dates from before 1st December 1790, otherwise plaintiff would have at once exercised the powers vested in him by Section X. Regulation XIX. of 1793 of dispossessing the defendant. It is argued, that it is only in cases under Section X. where the plea of limitation is of no avail, whereas it is fully applicable to claims under Section VI.

In considering this case, it appears that the judge, on being satisfied of the possession by defendant of the land in suit as rent-free for a period of more than twelve years before suit, dismissed the plaintiff's claim. His decision was passed on the 30th May 1855, while the case of Gungadhur Banerjee was not decided by this Court till the 10th September following. The decision of the 10th September in question certainly affirms the general principle of the application of the law of limitation to suits for resumption; but it does not thereby shut the door against the claim of plaintiffs in all cases where twelve years' possession can be established. No more was under the Court's consideration at the time than whether the principle, laid down by the Court on the 20th May 1848, in case No. 24 of 1847, that the law of limitation is inapplicable to suits for resumption of alleged rent-free tenures, was correct or not.

The argument was on the general question, on the assumption that the facts of the case were such as only to require its determination for the disposal of the case before the Court; and there is nothing in the decision opposed to the subsequent decision of the 22nd May 1856. That decision maintained the same doctrine, provided that a *bond-fide* rent-free holding was shown, such a one as the law could respect, *i. e.* of a creation previous to the 1st December 1790, all grants of a subsequent date being null and void. It cannot be said that the decision of the 10th September 1855 did not require this essential condition, for it is to be taken as a matter of course that the alleged grant must be shown to be what it professes to be. If then the plea of limitation be advanced, it must be by a party competent to put it forward, and this he cannot be considered to be, unless he shows himself in possession of a tenure which, from the duration of its existence, the law declares shall be respected. As the plea cannot be employed by a rent-free holder of a tenure created after the 1st December 1790, it follows that the right to advance it must rest upon proof of its existence before that date. This is also the principle of the decision dated the 24th July 1856, in case No. 5 of 1856. The enunciation of this principle in that case has been held to be but a *dictum* by the majority of the Court, who decided, on the 31st July 1857, the case now under review; but its enunciation was a necessary direction to the judge to whom the case was about to be remanded, as the plea of limitation founded upon a lakhiraj title had been asserted, and the circumstances under which the plea could or could not be sustained had to be pointed out. Without this having been done, the instructions of the Court in remanding the case would have been imperfect.

We do not see the force of the argument employed by defendant's pleader, that the suit having been brought under Section XXX. Regulation II. of 1819 is an admission on plaintiff's part of the existence of the tenure before the 1st December 1790, as otherwise he could have ousted defendant without recourse to law. The fact only proves that plaintiff was unwilling to take the law into his own hands, and cannot be construed into an acknowledgment of the nature asserted, for in that case he might as well have abstained from suing at all.

We conclude by delivering our judgment in favor of the view taken by the dissentient judge in this case on the 31st July 1857; and we remand the case for an inquiry to be made as to the existence of the asserted lakhiraj holding before the 1st December 1790 or not, and for the application of the law of limitation with reference to the judgment that may be formed thereon.

Mr. D. I. Money.—I do not know that I can add much to the remarks I made in this case, when I granted the application for a review of judgment.

Under the rules of practice, it has come up before a *full bench*, instead of the *whole Court*, to which, when I admitted the review for reasons explained, I thought the consideration of so important a point would have been submitted.

Arguments on both sides have been pressed with much force upon points extraneous, I think, to the real and sole question at issue.

We have only to consider whether the plaintiff, suing as a put-needar to assess land asserted by the defendant to be lakhiraj, is not bound by the general law of limitation, as in all other cases where force, fraud, or minority, is not specially pleaded, to prove that he has brought his suit within twelve years from the date on which his cause of action arose.

Under the English* law the party in possession is presumed to be the owner of the property until the contrary is proved, and the person seeking to eject must show a sufficient title in himself before he can recover. He will not be assisted by the weakness of the defendant's claim, whose *possession* gives him a right against every man who cannot establish a title. The plaintiff, therefore, must have a right of entry. But this right may be destroyed by the statute of limitations, if the defendant has been in possession adverse to the plaintiff's title for such period as is protected by the statute, and the plaintiff is barred of his remedy.

The same principle may, I think, be applied to the case before us.

The adverse possession of the defendant cannot be denied.

The Court, in the case of Gungadhur Banerjee, expressly declared that such possession was adverse, there being between the zemindar and lakhirajdar, it was said, "a perfect equality when the suit is brought."

If it be argued that the adverse possession by the defendant is negatived, because the plaintiff, although out of time under the general law of limitation, having brought his suit twelve years after his cause of action, has never, in the eye of the law, been out of possession, inasmuch as he occupies the place of the original landholder before the decennial settlement, who could have ejected the defendant as not holding under a valid title, the argument is not, in my opinion, a sound one.

The general law of limitation pleaded by the one party, and the special and prescriptive law claimed by the other, were enacted on the same day in the same year, 1st May 1793. The general law, Section XIV. Regulation III. of 1793, has precedence in point of *number*, though not of date, of the special law, Section X. Regulation XIX. of 1793.

* See Adams on Ejectment.

From the passing of Regulation III. of 1793, the zemindar could not be heard in any suit whatever in a civil court, if the cause of action arose twelve years before the suit was instituted. This prohibition hangs over him still ; and it is remarkable, as I stated before, that no part of the law, Regulation II. of 1805, which limited the Government right to resume to sixty years, in any way affected the general law of limitation. He is bound by it as much as ever.

Adverse possession for twelve years gives a title against the legal owner ; and if it could be maintained, which I do not for a moment admit, that inasmuch as, under what has been designated the *nullum tempus* clause, Section X. Regulation XIX. of 1793, no length of time can give the defendant a title, and that he could, therefore, only have held the property by *permission* of the zemindar, and consequently his possession was not adverse—still, in my opinion, he, the putneedar, must come under the general law of limitation, which admits of no exception, and he cannot, upon any show of equity, or with any semblance of right, do now what the zemindar could not do twelve years after the passing of that Act.

The zemindaree title may give him the right of entry, but the statute of limitations specially pleaded by the defendant operates as a bar to that right ; and, if the plea is good, the plaintiff cannot prove his possessory title, and the defendant is entitled to continue in possession.

We cannot in this case look at the defendant's title instead of the plaintiff's right of action. We cannot compel the defendant to show that he has been in possession for more than twelve years. As far as the pleadings are concerned, and the rules of pleading, the defendant might confess that he had been only one day in possession, and that he has no right to the land at all, except what he derives from personal possession, but he is at liberty to say to the plaintiff : “you are bound by the general law of limitation—you do not plead exemption from it under any special law—before, therefore, I show my title, you must show that you are suing within twelve years from the date on which your cause of action occurred ;” and it is incumbent on the Court to take up and determine this plea.

Section X. Regulation XIX. of 1793 does not, in the slightest degree, affect the general law of limitation *quoad the plaintiff*. It merely rules that a grant shall not be valid after any lapse of time, if given after 1790 ; but the plaintiff who comes into court to establish the invalidity of the grant must first show that he has brought his suit within twelve years, and is *entitled to take advantage of the invalidity of the grant*, or to obtain a decree, supposing the invalidity established. The provisions of this law, moreover, which is a special law, cannot affect the case, as they were not specially pleaded by the plaintiff. To compel the defendant in such a case to show his title, or even *prima facie* evidence of title, is, in my

opinion, contrary to the established rules of pleading; and if the precedent be followed in our courts, it will inflict great injury upon many parties similarly situated as the defendant.

There would be no security of property, if, as in this case, those who had the right originally to question the defendant's title forbore to do so, and a dormant claim, which they had never pressed and over which they had slumbered for years, was allowed by their successor to be revived and to prevail against—what the judge has found to be on the part of the defendant—a long and uninterrupted possession.

Extend this principle, and the mischief will increase tenfold, while time wears on, unless checked by some legislative enactment; and, a few generations hence, the successors of those who hold lands now upon an alleged lakhiraj title will, if they cannot prove that they held before 1790, have their land wrested from them, although the plaintiff may have brought his suit a century after his cause of action arose.

Under these circumstances, I would again confirm the decision of the lower court, and reject the appeal, with costs.

THE 12TH JANUARY 1859.

A. SCONCE, Esq., Judge, and D. I. MONEY and G. LOCH, Esqs.,
Officiating Judges.

Case No. 166 of 1858.

Special Appeal from the decision of Baboo Gobindchunder Chowdree, Principal Sudder Ameen of Moorshedabad, dated 30th March 1857, reversing a decree of Moulvee Gholam Ghous, Sudder Ameen of that district, dated 29th December 1855.

Kishennath Roy, (one of the Defendants,) *Appellant,*
versus

Hureegobind Roy and others, (Plaintiffs,) *Respondents.*

Baboos Ramapersad Rdy and Dwarkanath Mitter, for Appellant. Moulvee Aftabuddeen Mahomed and Baboo Bhoobunmohun Roy, for Woomamoye Debea, one of the Respondents. Baboo Shumbhoonath Pundit, for Hureegobind Roy.

THIS case was admitted to special appeal on the 4th March 1858, under the following certificate recorded by Messrs. B. J. Colvin and J. S. Torrens.

— Held that an adopted son is entitled to share collaterally, and the son of an adopted son is entitled to the rights of his father.

“ This was a suit referring to the property left by one Nursingh Deb Roy, who died without issue. The plaintiffs are the sons and grandsons of one of the half-brothers of Nursingh Deb, Ramkissen, and

they sue for succession to the whole of the property of Nursingh, making the petitioner a defendant. The petitioner is the son of an adopted son of another half-brother of Nursingh's, called Telokechunder, and claims to participate in the property along with the heirs of the elder half-brother. This claim having been rejected by the decision of the principal sudder ameen, on the ground that, according to the bywusta of the pundits, the heirs of an adopted son could not succeed collaterally, petitioner urges such decision to be opposed to Hindoo law, as laid down at page 78 of Macnaghten, and page 219 of Sutherland's translation of the *Dattaka Chandrika*, as well as to precedents of this Court, as found at page 203 of Volume VI. of the *Select Reports*, and elsewhere. We admit the special appeal to try whether the decision of the question of Hindoo law should be upheld."

JUDGMENT.

It is averred by the counsel for the special petitioner, that Nursingh Deb Roy died in 1215, leaving a widow, Taramonee, who continued in the enjoyment of his property till her death in 1228. Her daughter-in-law, Kumulmonee, then succeeded, and, after her death, as alleged by the plaintiffs, Hursoonderee, widow of Gokoolchunder Roy, a full-brother of Nursingh Deb Roy, adopted, without permission, a son named Bhoobuneswur, and, in collusion with the defendant, special petitioner, obtained possession of the property of Nursingh Deb. The five plaintiffs, who are the sons and grandsons of two half-brothers of Nursingh Deb, sued to set aside the adoption and to obtain possession of the property left by Nursingh, and made the special appellant, Kishennath Roy, a defendant in the suit. His answer disclosed that his father, Kasheennath Roy, had been adopted by Telokechunder Roy, another half-brother of Nursingh Deb Roy, and, as one of the family by adoption, he claimed a sixth of the property in litigation. The lower courts have given a decree for the plaintiffs, and rejected the (defendant) special appellant's claim, on the ground that the son of an adopted son is not entitled to share with the other collateral heirs; and the point to be determined is, whether the heir of an adopted son can succeed collaterally, as well as directly, and whether the bywusta of the pundits of the Dacca and 24-Pergunnahs courts, on which the present decision is based, is not erroneous. We think that, with reference to the decisions of this Court, reported at Volume VI. of the *Select Reports*, page 203, and Volume I., page 209, and the doctrine laid down in Macnaghten's *Principles of Hindoo Law*, Volume I., page 78, and in Sutherland's translation of the *Dattaka Chandrika*, page 202, an adopted son is entitled to succeed collaterally, and the special appellant, being the son and representative of such adopted son, is entitled to succeed to the rights and interests of

his father in the property, whatever they may be; and we, accordingly, reverse the decision of the lower court, and direct that the case be returned to the principal sudder ameen, who, after determining what are the rights of the special appellant, will pass a decision in conformity with the provisions of Section XIII. Regulation III. of 1793.

THE 12TH JANUARY 1859.

A. SCONCE, ESQ., Judge, and D. I. MONEY and G. LOCH, ESQS.,
Officiating Judges.

Case No. 201 of 1858.

Special Appeal from the decision of Mr. G. S. Bell, Principal Sudder Ameen of 24-Pergunnahs, dated 30th May 1857, affirming a decree of Baboo Neelmonee Mitter, Moonsiff of Kuddumgatchee, dated 26th December 1854.

Gooroopersad Chowdree and others, (some of the Defendants,)
Appellants,
versus

Radhamadhub Roy Chowdree and others, (Plaintiffs,) and Pran Doss and others, (Defendants,) *Respondents.*

Baboo Gobindchunder Mookerjee and Bungseebudden Mitter, for Appellants.

Baboo Dwarkanath Mitter, for Gunga Gobind Roy, (Plaintiff,) Respondent.

In a suit by plaintiffs to recover possession of lakhiraj land, from which, in consequence of the zemindars' entering into an engagement with their tenant, they had been summarily ejected, held, in conformity with other cases, that it was not necessary to try the validity of the plaintiffs' tenure.

This case was admitted to special appeal on the 24th March 1858, under the following certificates recorded by Messrs. B. J. Colvin and J. S. Torrens.

Mr. B. J. Colvin.—"Petitioners were purchasers of talook Baraset, &c., at a sale for arrears, of which special respondents had been previous proprietors. Petitioners sued summarily, for rent of 5 beegahs, one Pran Doss, who professed to hold them under special respondents, as their rent-free land. Petitioners got a decree for the rent as claimed, notwithstanding the objection of special respondents; and a suit to reverse it was brought by the special respondents, but was dismissed as brought beyond time. They have now preferred this suit on the ground of dispossession, in consequence of the decree in petitioners' favor for the rent of the land. Both courts have decided for them, assigning as a reason that petitioners should not have ousted them, as they did, by means of the summary suit, but should have proceeded regularly to sue for resumption and assessment of the land. It was objected in special appeal, that this decision is wrong, inasmuch as petitioners had the rent of the

land judicially awarded to them, and the lower courts should have pronounced upon the validity or otherwise of the tenure. On the other hand, a decision of this Court, dated the 8th instant, in the admitted special appeal case, No. 599 of 1857, is referred to as supporting the decision of the lower courts, that special respondents were entitled to re-possession for the reasons stated by them. I notice that, in the case referred to, the plaintiff was arbitrarily dispossessed of his lakhiraj land, and was restored to possession of it on proof of previous possession, leaving his opponent to sue for resumption regularly; but in this case special respondents were auction purchasers, and exercised no arbitrary act, but sued and got a decree for the rent of the land. I therefore admit the special appeal to try the correctness of the judgment of the lower courts."

Mr. J. S. Torrens.—"I would admit the special appeal, as I understand the plea taken to be that the collector should have been called on to report on the validity of the lakhiraj grant, and whether the land to which plaintiffs laid claim was lakhiraj or mal, and as I think, under the circumstances of the case, this report and a full trial of the lakhiraj title were requisite."

JUDGMENT.

It has been fully established in this case, in the opinion of the lower courts, that the defendants, now special appellants, had summarily ejected the plaintiffs, respondents, from certain lakhiraj land possessed by them, by accepting an engagement for the rent of the land from the plaintiffs' ryot, and by giving effect to that engagement by suing the tenant for arrears due under it. The words of the principal sudder ameen are, that plaintiff and their ancestors held the land lakhiraj for a long series of years.

The plaintiffs, it seems to us, cannot be held to be in any respect prejudiced by the transaction entered into between the zemindar and their ryot, and, following as precedents the decisions of the 5th August and 8th March of the past year, we think it was not necessary in this action to enter into the validity of the rent-free tenure. We dismiss this special appeal, with costs.

THE 12TH JANUARY 1859.

B. J. COLVIN, Esq., Judge, and C. B. TREVOR and G. LOCH, Esqs.,
Officiating Judges.

Case No. 420 of 1858.

Special Appeal from the decision of Mr. H. M. Reid, Officiating Judge of East Burdwan, dated 30th December 1857, affirming a decree of Mr. H. M. Reid, Officiating Collector of that district, dated 11th December 1855.

Madhoomonee Dasse and others, (Defendants,) *Appellants,*
versus

Bhuggobuttee Dasse, (Plaintiff,) and Umbikachurn Roy, (Objector,)
Respondents.

Baboo Sreenath Doss, for Appellants.

Baboo Kishenkishore Ghose and *Obhoychurn Bose*, for Respondents.

Held that a
zillah judge can-
not sit in appeal
from an order,
passed by him-
self as collector,
in a suit under
Regulation II.
of 1819.

THIS case was admitted to special appeal on the 6th July 1858, under the following certificate recorded by Messrs. C. B. Trevor and H. V. Bayley.

“ On the special appeal of petitioners, defendants, appellants below, to this Court, this case was remanded, inasmuch as, in the opinion of the admitting judges, petitioners were entitled to a finding of the judge as to the applicability of the precedent of the Sudder Court, reported at page 501 of the Decisions of 1855, to the portion of land claimed by them, amounting in extent to 1 beegah 6 cottahs.

“ The judge of Burdwan has dismissed their appeal on the point on which it was remanded.

“ Petitioners now appeal, specially urging that the judge who actually heard the cases when remanded was the same person before whom, as collector, the case was directly instituted, and who, in the first instance, judicially determined it; that, consequently, under Clause 4, Section IX. Regulation XIII. 1810, it was not competent to him to sit alone in an appeal from a judgment passed by himself alone. They pray, therefore, that their case may be remanded, to be heard by some judge other than that who has heard the case.

“ We think that the objection raised by petitioners is a valid one, and that, although there is no objection to a judge who has heard a case below sitting *with others* to decide the same case in appeal, still, both according to the letter of the law above cited and to the spirit of our appellate system, it is not competent for the same authority to hear a case *alone*, both in the first instance and in appeal. By this course litigants are deprived of that, without which an appellate system is useless, the attention of different minds to the point in litigation. We admit the special appeal

to try whether the appeal should not be remanded as required by special appellant."

JUDGMENT.

There is no special law bearing upon this case ; but the principle laid down by the legislature has always been that an officer cannot sit, as an appellate authority, upon an appeal from his own order passed in a subordinate capacity. This was declared in Regulation XIII. 1810, as regarded judges of the Sudder and Provincial Courts, until altered by Act II. 1851, in respect of Sudder judges, which enables a Sudder judge to sit as one of three judges in an appeal from his own order as zillah judge.

In like manner, by Clause 4, Section XII. Regulation XXV. 1814, a sessions judge cannot take cognizance of appeals from his own orders passed as magistrate. Construction No. 779 allows zillah judges to dispose of cases under Section XXX. Regulation II. 1819, reported by them ministerially in a former capacity of collector ; but in this instance things are different, as it is an appeal from an order passed by the zillah judge in a case originally instituted before him as collector. Notwithstanding the permission granted to the judge by letter, we are of opinion that, upon the principles which regulate our system of appeal, the judge was incompetent to try this appeal. We therefore reverse his order, and direct that he remit the case to the present collector, to whom we think it should have been remitted in the first instance, for the purpose specified in this Court's decision, dated 6th March 1857, from whose order the party dissatisfied may appeal to the zillah judge.

THE 12TH JANUARY 1859.

A. SCONCE, Esq., Judge, and G. LOCH and D. I. MONEY, Esqs.,
Officiating Judges.

Case No. 88 of 1857.

Special Appeal from the decision of Mr. A Littledale, Additional Judge of Behar, dated 20th December 1855, reversing a decree of Sheikh Shoojat Ali Khan, Sudder Ameen of that district, dated 6th July 1854.

Meer Ismael Ali, and, after his demise, his wife, Musst. Wajhun, and Syud Janut Hossein, and others, his sons and heirs, (Plaintiffs,) *Appellants*,

versus

Sheikh Burkut Ali and others, (Defendants,) *Respondents*.

Baboo Ramapersad Roy, Shumbhoonath Pundit, and Kishenkishore Ghose, for Appellants.

Moonshee Ameer Ali and Moulvee Aftabooddeen Mahomed, for Rajah Hetnarain Singh, one of the Respondents.

Mr. R. T. Allan, for Burkut Ali, one of the Respondents.

This suit was instituted to set aside an execution sale of lands, consisting of four kittas or portions; and the first court decided for the plaintiffs, but the zillah judge on appeal nonsuited the case, as the zemindar, who appeared as a third party, and professed to be in possession of one of the four portions, had not been made a defendant in the suit.

Held in special appeal, that the sole issue to be tried in this action was the validity of the execution sale; that the zemindar could not be required to plead to this issue; and that his possession of the land, as asserted,

THIS case was addmitted to special appeal on the 28th January 1857, under the following certificates recorded by Messrs. H. T. Raikes and A. Sconce.

Mr. A. Sconce.—"This suit was instituted by petitioners, plaintiffs, to set aside an execution sale and to recover possession of the land sold.

"The sudder ameen decided in favor of plaintiffs, but by the judge the plaintiffs have been nonsuited, because the zemindar of mouza Puchkoorna, in which portion of the lands sold was situated, had not been made a party to the suit.

"The lands sold consisted of one kitta, called Puchkoorna, in mouza Sooltanpore, of two kittas in mouza Ruttunpore Japa, and of one kitta in mouza Nogur Choonee.

"The purchaser, Burkut Ali, it seems, denied that he had got possession of the Puchkoorna land, as the zemindars of Sooltanpore had resumed it. Hetnarain, one of the zemindars, as a third party, gave in a petition to the same effect; and thus the judge, considering that the question of possession between plaintiffs and the zemindars could not be tried in the absence of the latter, nonsuited plaintiffs.

"The special appeal is made on these grounds: *first*, it is pleaded that, whatever may be the nature of the claim preferred by Hetnarain to possession of portion of the land sold, the objection presented by him raises no obstacle to the determination of the legality of the sale; and, *second*, that supposing the sale to

be illegal, it is competent to the court to decree in favor of plaintiffs the land not claimed by Hetnarain.

"I admit the special appeal to try these two points, and also, whether, supposing the claim for the whole land to go on, and a decree to be passed in favor of plaintiffs, it will not be sufficient to provide in the decree, that the interests of third parties, not defendants in the suit, shall not be prejudiced in the execution thereof."

could not be prejudiced by a decision made in his absence.

Mr. H. T. Raikes.—"I think the judge's order of nonsuit is right. The plaintiffs sue for *possession* of certain plots of ground indicated, and that a public sale may be cancelled by which their rights and interests were disposed of to Burkut Ali. Burkut Ali is the only defendant; and he states that a portion of lands, possession of which is sued for, is not in his possession, but in the possession of third parties. These third parties also appear and admit they are the possessors as by right. As the plaintiffs sue for possession, they are bound to bring before the court all those who hold adverse to their claim, or they should withdraw their claim to such portion of the lands as are in the possession of third parties; but under no circumstances can they require the court to adjudicate on their rights in their absence; and the court, therefore, is bound to force the plaintiffs to bring before it the proper parties between whom the controversy lies. I would, therefore, not interfere with the judge's order."

JUDGMENT.

Messrs. A. Sconce and G. Lock.—It appears that the defect imputed to the plaintiffs by the zillah judge in this case cannot affect the issue which alone induced them to sue. The sole purpose of the action is to set aside the execution sale of certain property, and to restore plaintiffs to the position they occupied before the sale. Thus, whether the sale was rightly or wrongly made, has alone to be tried; and, necessarily, if this issue be determined in favor of plaintiffs, the purchaser cannot be held answerable for the restoration of that portion of the sold property, which, he says, and which he may be able to prove, is not and never was in his possession. On the other hand, the zemindar, Hetnarain, not being a party to the execution sale, cannot be required to plead to that issue; nor can the possession of the portion of the land which he is said to have acquired, be prejudiced by a decision made in his absence. We, therefore, set aside the judge's order of nonsuit, and remand the case to be tried on its merits.

Mr. D. I. Money.—Although I think, under the provisions of the law and the practice of our courts, the judge was right in passing an order of nonsuit, the suit being not only for the reversal of the sale in execution of a decree, but for the *possession* of the

lands sold, and for wasilat, and a large portion of the lands sued for having been resumed by third parties, who were not brought into court, still I am of opinion that the judge in appeal might have directed the lower court to permit the plaintiff to put in a supplementary plaint, and by it bring in as defendants all the parties whose interests might be affected by a decree in his favor. I would so far admit the special appeal as to remand the case for this purpose.

THE 13TH JANUARY 1859.

B. J. COLVIN, Esq., Judge, and C. B. TREVOR and G. LOCH, Esqs.,
Officiating Judges.

*Regular Appeals from the decision of Moonashee Nazirooddeen
Mahomed Khan, Principal Sudder Ameen of Behar, dated
18th August 1856.*

Case No. 543 of 1856.

Maharajah Hetnarain Singh, (Plaintiff,) *Appellant,*
versus

Baboo Modenarain Singh and others, (Defendants,) *Respondents.*
Moonshee Ameer Ali and Baboo Unnodapersad Banerjee, for
Appellant.

Baboo Shumbhoonath Pundit and Mr. G. S. Fagan, for Respond-
ents.

Suit laid at Company's Rupees 46,422-3a.-1p.-9k.

Case No. 575 of 1856.

Musst. Doolhun, (one of the Defendants,) *Appellant,*
versus

Maharajah Hetnarain Singh, (Plaintiff,) *Respondent.*

Baboo Ramapersad Roy, for Appellant.

Moonshee Ameer Ali, for Respondent.

Suit laid at Company's Rupees 46,422-3a.-1p.-9k.

Appeal reject-
ed, as the me-
thod adopted by
the lower court
for adjusting the
accounts be-
tween the par-
ties was consi-
dered correct.

THIS suit was instituted to recover the sum of rs. 46,422-3-1, being principal and interest on account of revenue paid by the plaintiff in excess of the sum due by him, from 1250 to 1259, on Lot Sheebnuggur. The principal sudder ameen has given a decree against Modenarain, the principal defendant, for rs. 3287-4-5, the sum admitted by him to be due, and of rs. 916-3-11 against Basharat Ali, Doolhun, and others, and dismissed the plaintiff's claim as to the remainder.

Two appeals have been preferred from this order—one by the plaintiff Hetnarain, who objects to that part of the decision of

the lower court which dismisses his claim to the amount in excess of the sum admitted by the defendant Modenarain to be due, and he urges that the reasons assigned by the principal sudder ameen, for the conclusion he has come to, are insufficient; he urges, further, that the principal sudder ameen has given defendant credit for payments made in 1248 and 1249, whereas the period comprised in the present suit extends only from 1250 to 1259; and, further, that interest has been awarded from 1260, instead of the date on which the payments were made on the defendant's account.

The other appeal is preferred on the part of the defendant Doolhun, who pleads that, as regards herself, the decree has been given *ex-parte*; for the principal sudder ameen refused to accept her answer when she wished to file it. She urges that she only came into possession on the 7th March 1855, or 4th Cheyt 1262 F. S., but that the decree has been passed against her for a period antecedent to that date; that she was not aware, at the time, of the institution of the suit, no notice having been served upon her; but that immediately she heard of it, she proceeded to the court and filed a petition to be allowed to give in her answer, but her petition was rejected.

Plaintiff asserts that the amount of jumma due by him on Lot Sheebnuggur amounts to Company's rs. 62,741-13-10; that due by the defendant Modenarain to Company's rs. 53,274-2-1, and that due by the defendant Basharut Ali, Doolhun, and others to Company's rs. 377-3-2. The defendant Modenarain pleads that, under the tukseemnamah, or deed of partition, executed on the 30th December 1850, his share of jumma amounts to Company's rs. 51,570-10-8, the plaintiff's share to Company's rs. 64,445-5-3, and Basharut Ali and others' share to Company's rs. 377-3-2.

The principal sudder ameen accepts the jumma stated by the defendant Modenarain as correct, being in conformity with the deed of partition, and finds that he paid the revenue due on his shares to 1259, with the exception of rs. 3287-4-5, which were not liquidated till 1260 and 1261, and for this sum he has given a decree in the plaintiff's favor, with interest from 1259, the year in which the sum became due. In calculating the amount paid by this defendant, the principal sudder ameen has taken in payments made in 1248 and 1249 F. S., corresponding with 1840 and 1841 A. D., without which the account would not be complete; and though plaintiff, appellant, objects to this method of adjusting the account, he has assigned no sufficient reason why the payments of those two years made by the defendant Modenarain, if in excess of the sum due by him, should not be brought to his credit. We, therefore, find no grounds for interfering with the decision of the lower court as regards this appellant, and reject the appeal, with costs.

As regards the appellant Doolhun, we find that, though notice and proclamation were duly issued, she made no appearance in the lower court in proper time ; and though in appeal she urges her non-liability as not having obtained possession till Cheyt 1262, after the period comprised in the suit, yet we think this plea of no avail, as she has been made a party to the suit with other co-sharers, being the heir of a deceased partner ; and as she has assigned no valid reason for her non-appearance in the lower court, we reject her appeal also with costs.

THE 15TH JANUARY 1859.

B. J. COLVIN, Esq., Judge, and C. B. TREVOR and G. LOCH, Esqs.,
Officiating Judges.

Case No. 155 of 1857.

*Regular Appeal from the decision of Baboo Ramlochan Ghose,
Principal Sudder Ameen of Nuddea, dated 12th December
1856.*

Rutnessur Pal Chowdree and others, (Plaintiffs,) *Appellants,*
versus

Greeschunder Ghose and others, (Defendants,) *Respondents.*

*Baboos Ramapersad Roy and Kishenkishore Ghose, for Appellants.
Baboos Shumbhoonath Pundit and Bungsheebuddun Mitter, and
Moulvee Syud Murhumut Hossein, for Respondents.*

Suit laid at Company's Rupees 9955-11a.-5g.

The lower court's order in dismissal of the suit, as barred by limitation, reversed ; for as regarded portion of the property, the cause of action had arisen to plaintiffs within twelve years of institution of suit, and regarding the remaining portion, the law of limitation was to be applied or not, according to the state of facts found.

THIS suit was brought by plaintiffs, appellants, against Musst. Jugodumba, Greeschunder Ghose, Parbuttee Soonderee, widow of Hurchunder Ghose, and Pitumber Bhuttacharjea, and had its origin under the following circumstances.

Kaleepersad and Doorgapersad were the two sons of Dyaram Pal Chowdree. Kaleepersad left a widow, Shusheemookhee, mother of Jugodumba, while plaintiffs were the sons of Doorgapersad. Doorgapersad professed to have had his brother's estate left by hibbanamah to him, on his death in 1200 B. S., when Shusheemookhee having sued to set it aside, a compromise was entered into between her and Doorgapersad, by which he assigned certain lands, inclusive of a mehal, Bhurutpore, and other articles of property, movable and immovable, for her support ; so that she filed a ladavee, dated 28th Jeyt 1211, and the case was disposed of accordingly on the 13th May 1805. Again, Jugodumba sued Doorgapersad with the same object of setting aside the hibbanamah and the deed executed by her mother, on the ground that she could not be bound by her act ; and in that suit Doorgapersad satisfied Jugodumba

also by the assignment to her of some property for maintenance, whereupon a deed of compromise was executed, dated 29th Srawun 1225, and the suit was adjusted in the provincial court on the 12th August 1819. Jugodumba, however, had two sons, Greeschunder and Hurchunder, already named, and these in their turn sued the present plaintiffs, sons of Doorgapersad, and their own mother, to set aside the hibbanamah put forward by Doorgapersad and the compromises executed by Shusheemookhee and Jugodumba, and succeeded in the zillah court, on the 22nd August 1843, the decree of which court was affirmed in appeal by this Court on the 24th August 1844.

The present suit has, therefore, been brought by plaintiffs for the recovery of the property which was settled upon Shusheemookhee and Jugodumba upon execution of these compromises, to which they lay claim, as the object for which they were made over has been frustrated in consequence of the above decree.

The claim is for eight annas, as by the annulment of the hibbanamah and deeds eight annas remain with the defendants, heirs of Kaleepersad, in their own right, while the other eight annas are claimed by plaintiffs, as heirs of Doorgapersad.

The suit was brought on the 10th August 1855, or within twelve years from the date of the above decision, in the zillah court ; but the principal sudder ameen has dismissed it, as barred by the law of limitation, as the assignment had taken place in 1805 and 1818, to Shusheemookhee and Jugodumba respectively, and eight annas of Bhurutpore had been sold by the former to Ramjoy and Pitumber Bhuttacharjea on 2nd Assar 1218, or 1811, and had ever since been in their possession, and was now in that of Pitumber.

The appeal is solely on the point of limitation. We can have no hesitation in reversing the judgment of the principal sudder ameen as regards the property in possession of Jugodumba, Greeschunder, and Hurchunder's widow, Parbuttee, heirs of Kaleepersad, as the cause of action to plaintiffs against them arose from the date of the decree of this Court of the 24th August 1844, when the deeds and other documents were set aside ; but as regards the claim against Pitumber, the case is different. It has been argued against him that, as he derived from Shusheemookhee, his rights depend upon her's ; but we cannot admit this plea, for he has been in possession since 1218, or 1811, upon a title conferred by Shusheemookhee, in virtue of the deeds of compromise and assignments, which it was the aim and object of Doorgapersad to uphold, and according to which, Pitumber had been in possession, for upwards of twelve years before suit, of eight annas of Bhurutpore, upon what was believed by him to be a good and honest title under Regulation II. of 1805 ; so that were it clear that the eight annas held by him was the eight annas derived by Shusheemookhee from Doorgapersad, there is no

doubt that this suit for eight annas of Bhurutpore would be barred by the law of limitation; but there is no certainty on this point, as far as can be ascertained from the record, for the bill of sale to Pitumber from Shusheemookhee has not been filed.

We, therefore, reverse the order of the principal sudder ameen and remand the case for trial on its merits generally. As to eight annas of Bhurutpore, the principal sudder ameen will call upon Pitumber for his deed of sale; and if he find that it conveyed to him the specific moiety acquired by Shusheemookhee from Doorgapersad, he will apply the law of limitation as above laid down; but if it be for eight annas out of the sixteen annas without specification, he will consider whether plaintiffs are entitled to the eight annas share *still* in possession of the heirs of Kaleepersad, and he will pass eventually whatever order in the case may seem to him proper.

THE 17TH JANUARY 1859.

H. T. RAIKES and A. SCONCE, Esqs., Judges, and H. V. BAYLEY, Esq., Officiating Judge.

Case No. 632 of 1856.

Regular Appeal from the decision of Syud Ahmud Buksh, Principal Sudder Ameen of Mymensing, dated 20th August 1856.

Baboo Prosunno Coomar Tagore, (Plaintiff,) *Appellant,*
versus

Bhugeeruthee Debea Chowdrain and others, (Defendants,) *Respondents.*

Baboos Ramapersad Roy and Kishenkishore Ghose, and Moon-shee Ameer Ali, for Appellant.

Baboos Shumbhoonath Pundit and Dwarkanath Mitter, and Mr. R. T. Allan, for Respondents.

Suit laid at Company's Rupees 17,500-0-0.

Suit relative to chur land remanded for further investigation.

THIS suit was instituted to recover 3500 beegahs of chur land, which, on the 12th December 1851, had been awarded by the magistrate to the defendants, respondents, in adjudication of a case brought before him under Act IV. of 1840. The parties to this suit are zemindars of adjoining estates, plaintiff being proprietor of the pergunnah Pateeladuha and defendants of the pergunnah Jafer-shahee, and both claim the disputed land as alluvion, cast up as an annexation to their respective estates upon a site which had been previously covered by old land, that had been carried away by a branch of the river Koonaye or Berhampooter.

The principal sudder ameen has decided upon the record as it stands in favor of defendants ; but it seems to us that, considering the peculiar nature of the legal rights in alluvion as secured to zemindars by Regulation XI. of 1825, the proceedings held by the principal sudder ameen are not sufficiently complete ; and without entering into the reasons given for holding plaintiff's possession not to be established, we think the suit must be remanded with a view to a more complete elucidation of the facts upon which the determination of the legal title to the land may very materially depend.

The defect, which we think it highly essential to supply, is a survey of the disputed land and adjoining localities, which should exhibit the course followed by the branches of the Berhampooter at different periods, the position of the old lands of the two estates at the same periods, and the more recent formations of new land.

Both parties seem to agree that a branch of the Berhampooter at one time flowed where is now formed a narrow dry channel that separates the disputed land, as well as other land adjoining it on the north now possessed by plaintiff, from the estates of both plaintiff and defendants on the east thereof ; but neither the exact course of this branch, nor the breadth nor extent of the channel, nor the time at which it flowed, are now to be ascertained from the record. Plaintiff traces this channel, and the diluvion caused by it, to the period extending from the year 1218 to 1226. Defendants, on the other hand, say that the diluvion of their estate had not commenced till the close of 1239 ; that their old land was carried away from 1240 to 1242, and that from 1243 and later years the land began to re-form. As to the period of the accretion of the new chur, there appears to be no material dispute. Both say, at or about 1246 ; and no doubt several years elapsed before the chur took the form under which we have occasion to consider it. In 1849, or 1256, the claims of the parties seem first brought before the magistrate. This was about ten years after the settling down of the alluvion, and so far, up to this point, the principal sudder ameen may have assigned valid reasons for holding that plaintiff had failed to prove his possession of the disputed chur. But in this suit we have to consider the question of legal title, as well as possession ; and it is for the elucidation of the disputed title, that we think the country brought within discussion should be surveyed and mapped, so as to exhibit, as nearly as the lapse of time will permit, the course of the river and the features of the land, old or new, at the date of this action, at or about the year 1246, at 1239, and any period, five or ten years earlier, to which it may be possible to extend the enquiry. Having this additional evidence before him, the principal sudder ameen will again adjudicate the case according as the facts and law may seem to require.

THE 18TH JANUARY 1859.

B. J. COLVIN, Esq., Judge, and G. LOCH, Esq., Officiating Judge.

Petition No. 1420 of 1858.

Application for Special Appeal from the decision of Mr. H. M. Reid, Officiating Judge of East Burdwan, dated 25th June 1858, affirming that of Baboo Juddoonath Mullick, Sudder Moonsiff of that district, dated 21st April 1857, in the case of
Gostbeharry Dutt, *Plaintiff*, Petitioner,
versus

Muthoor Shaha and others, *Defendants*.

Moonshee Ameer Ali and Moulvee Aftabooddeen Mahomed, for
Petitioner.

Baboo Bhoobun Mohun Roy, for the Opposite Party.

Order of remand on application for special appeal. The judge held the claim barred, as it was false in part, and dismissed the suit. He was told that he should have given an opinion upon the other allegation of the plaintiff.

PLAINTIFF, petitioner, sued for 13a.-6g.-2c.-2k. of a tank and for value of fish. Both the lower courts dismissed his claim. It was held by the judge, in appeal, that a 2a.-13g.-1c.-1k. share clearly belonged to Rajnarain, and that petitioner had never been in possession, nor had been dispossessed from it. He thereupon dismissed the claim *in toto*, on the ground that the plaint, in respect to a portion of the property sued for, was an untenable one, and as plaintiff must have been aware that it was so when instituting the suit, he cannot look to obtain any assistance from the court in awarding him the remaining portion of his claim, even although no objection has been raised against it.

The plea in special appeal is, that the judge was bound to pronounce upon this portion of petitioner's claim. We remark that the allegation in the plaint was a right to a 13a.-6g.-2c.-2k. share by purchase and of dispossession from the above share after possession. The judge has found the allegation not to be proved as regards the 2a.-13g.-1c.-1k. share of Rajnarain, and adds that, although no one contests petitioner's right to the 10a.-13g.-1c.-1k. share, he cannot get the aid of the court in recovery of possession. This, however, depends upon the fact of, whether petitioner was, after possession, ousted from the share in question by defendants, on which the judge has pronounced no distinct opinion. Should the judge find that he had never been ousted, his order is correct; but should petitioner have been dispossessed by defendants, he is entitled to an order for restoration to possession. We therefore cancel the judge's order as regards the 10a.-13g.-1c.-1k. share, and remand the case for re-disposal with reference to the above remarks.

THE 19TH JANUARY 1859.

B. J. COLVIN, Esq., Judge, and C. B. TREVOR and G. LOCH, Esqs.,
Officiating Judges.

Case No. 290 of 1858.

*Special Appeal from the decision of Mr. W. S. Seton-Karr,
Officiating Judge of Jessore, dated 27th November 1857,
affirming a decree of Baboo Oopender Chunder Nyaruttun,
Principal Sudder Ameen of that district, dated 29th Decem-
ber 1854.*Mr. A. MacArthur, (Defendant,) *Appellant,*
*versus*Rajah Pertap Chunder Singh and others, (Plaintiffs,) *Respondents.**Mr. R. T. Allan*, for Appellant.*Baboos Ramapersad Roy, Gobindchunder Mookerjee, and Kishen-
kishore Ghose*, for Respondents.THIS case was admitted to special appeal on the 1st May 1858,
under the following certificates recorded by Messrs. H. T. Raikes and
B. J. Colvin.*Mr. B. J. Colvin.*—"This case was once previously before the
Court—see page 421 of the Sudder Decisions of March 1857. The
objection then taken by the petitioner was, that he was not liable for
the entire rent claimed, but that Mr. French was partly responsible;
and the Court held that, after petitioner's denial of sole occupancy
and the non-registration of his name as putneedar, a third party,
Mr. Dunlop, being so registered, plaintiffs should have been called on
to prove that petitioner was alone liable for the rent. The case was,
therefore, remanded for re-investigation with reference to the peti-
tioner's objection."The judge has now decided his liability, from an attested copy,
filed by plaintiffs, of an answer filed in another suit, relative to rent,
the same interests and between the same parties, by Mr. Stoddart,
manager for Mr. French, in which the judge records it is clearly
and undisputedly admitted that although, towards the close of the
year 1856, a division was made of the putnee Lot Biljoka, between
the factory of Meergunge on the one hand, belonging to petitioner,
and that of Paikdanga on the other, belonging to Mr. French, yet
that the latter party paid his share of the rent at the Meergunge
factory, to which he was subordinate, and got receipts there accord-
ingly."It is objected in special appeal, that this answer on the part of
Mr. Stoddart, the manager for Mr. French, can be no evidence
against petitioner.Mr. Dunlop
proprietor of the
Meergunge con-
cern, took an
estate in putnee.
After his death,
his executors
sold part of the
Meergunge con-
cern to Mr.
French and part
to defendant.
The lands of the
putnee were con-
sequently divid-
ed without the
knowledge or
consent of the
zemindars, who
sued the defend-
ant for the rent
as representative
of Mr. Dunlop.
He pleaded his
liability to pay
rent only for
such portion of
the putnee as
was in his use
and occupation.
The judge, on
remand, having
received copy of
an answer of Mr.
French's, filed
by him in a
separate suit for
the rent of this
putnee, gave a

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decree against defendant.

Held that the answer of Mr. French in another suit, which had not been decided, could not be considered as legal evidence against defendant, till the averments contained therein had been adopted by the court.

Held, further, that, as defendant succeeded Mr. Dunlop as proprietor of the concern, and was, as far as the plaintiffs could be expected to know, the representative of Mr. Dunlop, no information of the private arrangements made by the executors of Mr. Dunlop having been made to plaintiffs, in whose books Mr. Dunlop's name still continued to be registered as putneedar, the plaintiffs were right in making the demand of the whole rent from him; that, as he had previously filed a petition claiming possession of the whole putnee, and declaring himself liable for the rent, he must, from it and other evidence adduced by the plaintiffs, be considered liable for the whole rent; that it was for defendant, who advanced the plea, to prove separate use and occupation; and

"I admit the special appeal to try the point."

Mr. H. T. Raikes.—"I would not admit this application on the ground taken by the certificate.

"The liability of Mr. MacArthur was, in my opinion, held to be proved on sufficient grounds in the judgment passed before the remand, independent of the non-registration of his name. The zemindars sued him for the putnee rents, and he pleaded that another party was liable for some part of them, to whom his vendor had conveyed a share of the putnee. As the claim was for back rents, this was a point for consideration and decision; and the judge expressed himself of opinion that Mr. MacArthur's full liability was fairly deducible, from the fact of his having petitioned the judge to serve notice on the zemindars, that he was the party liable for all the rents and was ready and willing to discharge them. On the ground of this petition the judge refused to accept Mr. MacArthur's qualification of its meaning as something less than it expressed, and held it to be a sufficient admission to warrant a decision in plaintiffs' favor. Further proof than this appears to me quite unnecessary; and I would not admit the appeal on the ground of insufficiency of proof as afforded by the particular paper alluded to. When the proof on the record is sufficient, it is unnecessary to refer to other parts of the record, or to the effect of that part on the mind of the judge below."

JUDGMENT.

Messrs. C. B. Trevor and G. Loch.—It appears that the plaintiff had given Lot Biljoka in putnee to Mr. Dunlop, proprietor of the Meergunge concern. After his death his executors, as alleged by the counsel for special appellant, sold part of the concern, embracing Paikdanga and other factories, and with them part of the lands comprised in Lot Biljoka, to Mr. G. R. French, and the remainder of the concern to Mr. MacArthur, the special appellant. The zemindars, considering Mr. MacArthur to be the representative of Mr. Dunlop, he being in possession of the Meergunge concern, and not being aware of the private arrangements entered into with Mr. French, brought an action to recover arrears of rent from 1255 to 1259, and obtained a decree in the principal sudder ameen's court, which was affirmed on appeal to the judge on the 14th April 1856. In that suit the defendant pleaded, that part of Biljoka had been sold to Mr. French, and, consequently, he was liable for only such portion as remained in his possession. The judge, in disposing of the case, referred particularly to a petition presented by Mr. MacArthur to the judge on the 16th September 1851, in which he represented himself as liable for the rent of certain lots, and among them Biljoka, which the plaintiffs' naib refused to take; and as the zemindars were ignorant of the private arrangements made with Mr. French, the judge considered

Mr. MacArthur liable for the whole rent. A special appeal was preferred, and the case was remanded by this Court on the 20th March 1857, with this remark, "that plaintiffs should, after petitioner's denial of sole occupancy and referring to **Mr. Dunlop's** name being still registered as putneedar, have been called upon to prove that petitioner was alone liable for the rent," and the case was remanded for re-investigation with reference to petitioner's (**Mr. MacArthur's**) objection. In conformity with this order, plaintiffs were called upon to prove the sole liability of the defendant, **Mr. MacArthur**, and filed copy of an answer given by **Mr. Stoddart**, manager for **Mr. G. R. French**, in another suit instituted by them for the rent of Lot Biljoka for the year 1261, and in which they had, apparently, under the circumstances disclosed in the former suit, made **Mr. French** a party. The answer admitted possession of certain portions of Lot Biljoka, but asserted that "the rent had been paid to the Meerunge factory, to which he was subordinate, and he held receipts." The judge, under these circumstances, upheld his former decision, and, on the 27th November 1857, gave a decree for the whole amount of rent against **Mr. MacArthur**. A special appeal has been admitted, to try whether the petition filed by **Mr. Stoddart** in another case can be evidence against the petitioner.

that if he wished to have his liability limited, he should apply to the zemindars to have his name properly registered.

We hold that the petition of **Mr. Stoddart**, manager of **Mr. G. R. French**, on which the judge relies in his decision of the 27th November 1857, is not evidence against the special appellant. The petition is an answer to a claim advanced by the present plaintiffs against the present defendant, **Mr. MacArthur**, and **Mr. French**, for rent of 1261, for Lot Biljoka. In the answer **Mr. French** admits separate possession of part of the lands of Biljoka, but pleads payment of rent to **Mr. MacArthur** as holding subordinate to him. At the time the present suit was disposed of, that case was still undecided, and we are in ignorance whether this averment of **Mr. French's** has ever been proved, and till those averments have been adopted by the court, they cannot be considered as evidence at all against **Mr. MacArthur**. We do not, however, think it necessary to remand the case, as the point in litigation can be determined from the record as it is, and we, with due deference to the opinion expressed by the judges who passed the order for remand on the 20th March 1857, are inclined to question the correctness of the rule therein laid down, which required plaintiffs to prove the sole responsibility of **Mr. MacArthur** for the rent. We think that, under the peculiar circumstances of the case, Lot Biljoka having been given in putnee to **Mr. Dunlop**, proprietor of the Meerunge concern, and **Mr. MacArthur** having succeeded him as proprietor of that concern, the zemindars, in whose books **Mr. Dunlop's** name was still recorded, and who have shown that the rents were always paid by **Mr. Dunlop** as owner of the Meerunge factory, and were not aware of the private arrangements entered into by **Mr. Dunlop's** executors,

were justified in demanding the whole rent from Mr. MacArthur, who, as far as the zemindars were concerned, represented Mr. Dunlop, and as he advanced the special plea of non-occupation, it was for him to have proved it.

The question, therefore, before us is, whether Mr. MacArthur is, in the first place, responsible to the zemindars for the whole rent of Lot Biljoka. Now, it is not denied that the lot was let in putnee to Mr. Dunlop as proprietor of the Meergunge concern, and that Mr. MacArthur has succeeded him in that concern. It is contended, however, that Mr. MacArthur is not the complete representative of Mr. Dunlop, but only in part, as a large portion of the Meergunge concern, inclusive of some of the Biljoka putnee, has been sold to Mr. French; and as the present suit is not under Regulation VIII. of 1819, but for use and occupation, Mr. MacArthur can be held responsible only for the rent of that portion of the putnee remaining in his possession. But it must be observed that the putnee being let to Mr. Dunlop as proprietor of the Meergunge concern, and, as far as the zemindars could legally be expected to know, Mr. MacArthur had succeeded him; the zemindars were, consequently, warranted in making the demand for rent against him, particularly after the petition presented by Mr. MacArthur's agent, dated the 16th September 1851, in which he declared himself to be in possession of the whole of this and other lots. If Mr. MacArthur considered himself responsible only for a part of the rent, it was for him to show of what his possession consisted. It is urged that the judge has misunderstood the meaning of the petition of the 16th September 1851, that its purport was to express Mr. MacArthur's willingness to pay rents in proportion to the lands in his possession, and the zemindars' dewan refused to take rent in consequence of his only offering a portion. The expression used in the petition is, however, distinct, and in it Mr. MacArthur clearly claims this whole lot, and the reason there assigned for the refusal of the zemindars' dewan to take rent from him, is a desire on the part of the zemindars to secure payment of a larger sum in the shape of interest, which they hoped to realise by bringing the putnee to sale. We concur with the judge in the view he has taken of the meaning of the petition. If Mr. MacArthur wishes to relieve himself from the payment of the whole rent of Lot Biljoka, he should, as was the case when Haut Radhanuggur was separated from this putnee, apply to the zemindars to have his name registered either jointly with or separately from Mr. French, with specification of jumma payable by each, and it would remain with the zemindars to proceed under Sections V. and VI. Regulation VIII. of 1819; but till such an arrangement be made, we consider, from the evidence in the case, among which is his own petition, that Mr. MacArthur must be held responsible for the whole rent. We dismiss the special appeal, with costs.

Mr. B. J. Colvin.—I concur with my colleagues in rejecting, as evidence against the petitioner, the answer referred to in the certificate.

THE 20TH JANUARY 1859.

B. J. COLVIN, Esq., Judge, and C. B. TREVOR and G. LOCH, Esqs.,
Officiating Judges.

Cases No. 314 and 315 of 1858.

Special Appeals from the decision of Syud Ahmed Buksh, Principal Sudder Ameen of Mymensing, dated 3rd December 1857, reversing a decree of Bhoopchurn Dass, Moonsiff of Nikles, dated 9th June 1857.

Chundermohun and others, (Defendants,) *Appellants*,
versus

Nurnarain Chunder, and after him Hurendurnarain and others,
(Plaintiffs,) *Respondents*.

Mr. R. T. Allan, for Appellants.

Moulvee Murhumut Hossein, for Respondent, Hurendurnarain,
in case No. 314.

THIS case was admitted to special appeal on the 10th May 1858, under the following certificate recorded by Messrs. J. H. Patton and A. Sconce.

"This suit was instituted to set aside the sale of the rights and interests of Nurnarain Chunder, as made in execution of a decree. The two main reasons assigned for quashing the sale by the lower court are—*first*, that notification of sale was not published in the moonsiff's court, and, *second*, that though the record of execution showed that the judgment debtor had died, his heirs had not been made answerable to make good the claim before the sale was carried out. In these applications the second point only is noticed, but the first ground is untouched by the petitioners; and under such circumstances, if the absence of notice to the heirs of the deceased debtor were not to be considered a material defect, the principal legal ground assigned for quashing the sale is unchallenged.

"We admit the special appeal, however, upon a second point. It seems that the purchase-money had been paid to the judgment debtor; that the first court made an order for the repayment of that sum by plaintiff; but that the principal sudder ameen has reversed that portion of the moonsiff's judgment. We admit the special appeal to try whether the repayment of the purchase-money to the purchaser should not be in this case provided for."

On the reversal of a sale in execution of decree, the first court ordered reimbursement of the purchase-money to the petitioners. This order was upset by the lower appellate court. On appeal to this Court, the last order was upheld, as there had been no allegation in the pleadings, and no proof on the record, that the plaintiff had had the benefit of the sale proceeds, and petitioners, in their answer, had not made any allusion to the purchase-money, or claimed its restoration.

JUDGMENT.

In this case plaintiff was the judgment debtor, whose property having been sold to satisfy the decree against him, he sued to have the sale set aside on the ground of informality, making the alleged heirs of the decree-holders the purchaser at sale, and the petitioners, who bought the property from the purchaser, defendants. The first court reversed the sale, but attached a condition to the decree in plaintiff's favor, that he should pay the petitioners the price for which the property had been sold. From this order two appeals were preferred, one by plaintiff to be freed from the condition in question, and the other by the petitioners to have the sale maintained.

The latter appeal was dismissed by the principal sudder ameen, and in the former that officer, without assigning any reasons, exempted plaintiff from repayment of the purchase-money. There was also an order regarding wasilat, which, not being now in controversy, need not be noticed.

Petitioners have now preferred this special appeal, that the moon-siff's order regarding the repayment of the purchase-money to them by plaintiff may be upheld, but this prayer we are unable to grant. We find no allegation in the pleadings, and no proof on the record, that the sale proceeds have been appropriated by, or applied to the benefit of, the plaintiff. As a matter of equity, it appears to us right that a judgment debtor, who has procured the reversal of a sale of his property, should indemnify the purchaser if he has had the benefit of the purchase-money. It was, however, held by a full Court, on the 23rd July 1856, (*page 607*.) that it must be shown that such benefit has been received by him before an order for restoration of the purchase-money by him can be passed; and, as we have said, this is not apparent in any way in this case, and in fact petitioners in their answer never made any allusion to the purchase-money or laid claim to its restoration. A decision, dated 8th January 1857, (*page 27*.) has been pointed out to us, in which, on a sale in execution of a decree being reversed, the plaintiff was directed to indemnify the purchaser; but there was no contention on the point before the Court at the time, whereas in this case issue has been joined on it directly in the lower appellate court, by the plaintiff seeking to be absolved from reimbursing the purchaser, and in this Court by the petitioners who claim to be indemnified. We, therefore, in conformity with the precedent of 1856, dismiss the present appeals, with costs.

THE 20TH JANUARY 1859.

H. T. RAIKES, J. H. PATTON, and A. SCONCE, ESQS., Judges.

Case No. 205 of 1858.

Application for Review of Judgment passed by Messrs. H. T. Raikes, J. H. Patton, and A. Sconce, in case No. 403 of 1857, decided on 29th May 1858.

Kaleepersad Roy Chowdree, (Appellant,) *Petitioner,*
versus

Kishenindur Chowdree, (Respondent,) *Opposite Party.*

Baboo Unookoolchunder Mookerjee and Mr. R. N. Doyne, for
Petitioner, Ex-parte.

THIS case relates to the liability of plaintiff, the purchaser of a share in pergunnah Jehangeerpore, to pay, or not to pay, a fixed maintenance allowance to the defendants, which, since and before the permanent settlement, had been paid by his predecessors in the estate. By our judgment we affirmed the decree of the principal sudder ameen, which discharged plaintiff from this liability; and in the argument for the review of this judgment, it is argued that the charge in question was imposed by way of assessment upon the estate; that it was so recognised at the time of the permanent settlement; and that by virtue of the conditions of that settlement, the charge for the allowance continues binding upon the plaintiff.

This suit relates to the liability of plaintiff, proprietor of a permanently-settled estate, to pay a fixed maintenance allowance, in addition to the sudder jumma of his estate. Judgment was given in favor of plaintiff by the lower appellate court, and in special appeal that judgment was affirmed; but good cause being shown for questioning the construction of the terms of the permanent settlement, as already adopted, review of judgment is allowed.

The learned counsel for the petitioner, besides commenting upon the documents on the record, adduced a memorandum drawn up in the Board of Revenue on the 14th July 1857. It appears that, in consequence of the original records of the settlement not being available in the collector's office, a reference had been made to the Board for information, and that, in the memorandum now referred to, an extract or abstract of the arrangement made at the permanent settlement is embodied. The full conditions of the settlement are not given in this paper. First, we have the jumma of 1196 or 1789-90; then a deduction of rs. 3999 is made for akhrajat, meaning the allowance now in question; and, with an increase of rs. 8000, the total jumma becomes rs. 1,26,000. So far, the settlement paper embodies the entry of the item for akhrajat, as it is called; and, undoubtedly, in subsequent years, the possession of the estate was, in practice, understood to carry this liability; but whether the terms of the engagement taken in 1790-91 did absolutely bind the proprietors of the estate in future, if it may not be decided from the memorandum now before us, may possibly be capable of elucidation by procuring the settlement itself, from the only office where it would appear to be available.

As the case now stands, the petitioner has shown good cause for doubting the construction drawn by the principal sudder ameen as to the obligation imposed on the estate by the settlement of 1197 ; and it seems to us that the special appeal should be re-opened for a further hearing in that matter.

THE 22ND JANUARY 1859.

H. T. RAIKES and A. SCONCE, Esqs., Judges, and H. V. BAYLEY, Esq., Officiating Judge.

Case No. 302 of 1857.

Regular Appeal from the decision of Mr. A. Littledale, Judge of Shahabad, dated 17th January 1857.

Resal Tewaree, (Plaintiff,) *Appellant,*
versus

Musst. Mukbool Fatima and others, (Defendants,) *Respondents.*
Baboos Shumbhoonath Pundit and Gobindchunder Mookerjee, for Appellant.
Moonshee Ameer Ali, for Respondents.

Suit laid at Company's Rupees 77,825-11.

THIS suit is for possession of fourteen annas of mouzahs Kyda Gopalpore, Nuktownlee, Anothwa, Choramun Durhee (uslee and dakhilee), and sixteen annas of Jumowa Simosee, alleged to be held in farm by plaintiff, valued at rs. 32,226-13, and for mesne profits from 1252 to 1261, valued at rs. 28,593-11-1 principal, and rs. 16,005-2-3 interest, or at a total of rs. 77,825-11.

The plaintiff's claim is based on the *teeka pottah* for forty years, from 1252 to 1291 F., with a jumma of rs. 1000, said to be signed and sealed by Kassim Hossein, the proprietor of the lands farmed. The plaintiff avers that Kassim Hossein received the rent of 1252 in advance from plaintiff, and gave him a receipt, dated 1st Falgoun 1251 F., also under his seal and signature. It is further stated in the plaint, that when plaintiff's peons went to the farmed land in Srawun 1251 F., to arrange for the rents of 1252, they were not opposed, but that when they went in Assin 1252 they were opposed and prevented from collecting rent by Mukbool Fatima, the wife of Kassim Hossein, a defendant in this case. Plaintiff also avers that, at the time he received the *pottah* above referred to from Kassim Hossein, he gave that person a *kuboolyut*.

The defendant, Mukbool Fatima, after objecting to the want of precision in the plaint as to the exact date of the alleged dispossession, and as to the amount of collections by plaintiff, denied that

Appeal dismissed on the evidence and probabilities of the case. Decision of the zillah court showed the seal on the pottah and receipt pleaded, to have been at the command of a dependant, who abused the power it gave him. The lease was of an unusually long period, and on most favorable terms. Nodispossession had formed the subject of complaint, and this suit was brought more than ten years after alleged dispossession.

Kassim Hossein had ever given the pottah and receipt alleged by plaintiff, or ever received the kuboolyut stated by plaintiff to have been given to him by Kassim Hossein, and the rs. 1000, or one year's rent in advance. Defendant added that the seal of Kassim Hossein was at the command of a dependant named Mohun Doss, who could thus, in collusion with plaintiff, have fabricated a pottah ; and that two decisions in the zillah courts, of the 21st January and 16th August 1850, proved this.

The defendant, moreover, pleaded that the period of the lease was of unusual length ; that the pottah was not witnessed ; that the stamp was purchased in November 1843 by a resident of a village other than where the parties resided ; that the jumma in the pottah was totally inadequate to the value of the farm ; and that the plaintiff neither showed his dispossession nor that the amount of meane profits had been calculated by him on any legitimate basis.

The judge tried the case on the 17th January 1857, and his decision is given at length in pages 14, 15, and 16 of the *Zillah Decisions* of Shahabad of that month.

He held that the zillah courts had, on the 21st January and 16th August 1850, declared that the suits then decided had been trumped up by some one who had access to the seal of Kassim Hossein ; that the pottah and receipt adduced by plaintiff in this case had not the signatures of either the writer or of witnesses, and were unregistered ; that the oral testimony in support of the above documents was that of *kashtkars*, or cultivators, except two, one of whom was a putwaree, and that that testimony was insufficient, especially as the lease was for an unusual term, at a very low rent, without an adequate consideration, as evidenced by the jummaundee shown in the accounts of the collectorate ; and that as, notwithstanding so favorable a lease and so immediate dispossession from it, plaintiff had not moved to recover possession for ten years. The judge also considered the purchase of the stamp paper at another village, while there was a vendor at that at which Kassim Hossein resided, and by persons unconnected with either party, six weeks and two months before the date of the documents, to be against the truth of plaintiff's claim.

The judge on these grounds dismissed it.

The plaintiff now appeals ; and the pleader urges that Mohun Doss had full authority to use the seal of Kassim Hossein for the purpose of giving leases ; that the decisions of the 21st January and 16th August 1850 prove this ; that no unfavorable presumption could be made against the plaintiff from the delay in suing, so long as he was within the period allowed by law ; that where the lessor is a respectable party, as Kassim Hossein was, registry is not resorted to ; that leases for long periods were not unusual ; that the amount of jumma was a matter of contract between the parties, as shown by

the pottah and receipt ; and that the collectorate accounts could afford no permanent basis for calculating the rent, as rents varied in various years. The pleader also urges that pottahs are not usually signed by witnesses ; that the defendant had himself termed the purchaser of the stamp the plaintiff's relative, but had not proved it ; and that plaintiff's petition of the 15th Pous 1252 to the police showed that he was dispossessed as he alleged.

JUDGMENT.

We do not consider that the above pleas afford sufficient ground for interfering with the decision of the court below.

The decisions of the 21st January and the 16th August 1850 clearly show that the zillah court held the seal of Kassim Hossein to have been at the command of a dependant, who abused the power it afforded him. The signature of Kassim Hossein to the pottah and receipt is not proved by plaintiff in any sufficient way ; for even admitting the plea urged by appellant's pleader, that most of the witnesses, although *kashtkars*, were Oojains and Brahmins, still the oral testimony is opposed to the strong probabilities of the case. The period of the lease is unusually long, and no lease of a parallel period is shown to us.

The only document tendered in proof of the alleged dispossession is a petition to the police, on which the darogah reports that no breach of the peace had occurred, and that he had referred the party to the magistrate. The delay to sue for ten years, while it is of course no bar to the suit, may fairly be weighed as one of the probabilities against the truth of the alleged injury, more especially as no facts are shown us to refute the judge's finding, that the jumma of the pottah showed that the lease was one on the most favorable terms to plaintiff.

We further think that the judge's remarks, in regard to the purchase of the stamp, and the non-registry of a pottah of so favorable a character, and for so unusually long a period, support his judgment, and are in no way met by appellant.

On these grounds we dismiss the appeal, with costs on appellant.

THE 22ND JANUARY 1859.

H. T. RAIKES and A. SCONCE, Esqs., Judges, and H. V. BAYLEY, Esq., Officiating Judge.

Case No. 432 of 1857.

Regular Appeal from the decision of Moulvee Mahomed Haneef Khan, Principal Sudder Ameen of Patna, dated 13th February 1857.

Juggurnath Tewaree, (Defendant,) *Appellant,*
versus

Sheikh Imdad Ali, (Plaintiff,) *Respondent.*

Baboos Ramapersadd Roy and Kishenkishore Ghose, for Appellant.
Mr. R. T. Allan and Moonshee Ameer Ali, for Respondent.

Suit laid at Company's Rupees 6844-13-4.

THIS suit was instituted by the proprietor of two permanently settled villages, named Dholepoora and Bishenpoora, to recover beegahs 126-7 from defendant, which defendant professed to call lakhiraj, but which plaintiff asserted to belong to the assessed land of his estates. Judgment has been given in favor of plaintiff by the principal sudder ameen; and hence we have the present appeal brought by the defendant against that order.

It appears that, in the course of the year 1836, a claim was raised by the collector on the part of Government to resume this land under the provisions of Regulation II. of 1819; that on that occasion the supposed lakhirajdar, that is, the present defendant, asserted the land to be mal land, on account of which they paid rent to the proprietor of the villages Dholepoora and Bishenpoora; and that the collector, accepting this plea, withdrew the resumption suit. Accordingly, the principal sudder ameen, in the present action, has held the defendant to be bound by the statement made in 1836, and, without looking to the proof which the plaintiff may be able to adduce of the land being the assessed land of his estate, or the defendant that the land is lakhiraj and was excluded from the permanent settlement, has affirmed the plaintiff's title to the land.

Appellant contests the application given by the principal sudder ameen to the admitted answer made in 1836; and we concur in the force of his objection. It appears to us that, though the answer made in 1836 by defendant may be used as evidence against him in this suit, it cannot be held absolutely to conclude the dispute now raised. The answer so made may savour of fraud; and the party against whom the fraud was used, that is, the collector, may have been over-reached, but the possibly untrue statement does not in itself create a title in favor of plaintiff for the disputed land; and as between the present parties it seems to us that the exact nature of the disputed land is still open to adjudication in the usual manner.

Suit by a proprietor of a permanently settled estate to recover land belonging to that estate, which was declared by defendant to be lakhiraj, was adjudged in plaintiff's favor upon the strength of a statement made by defendant in a resumption suit, that he paid rent under the estate to the zamindar; but it is held in appeal, that this statement is not conclusive against defendant, and that the statement, possibly untrue, does not create a title in favor of plaintiff. Accordingly the case is remanded to be disposed of on its merits.

We accordingly remand the case, for re-hearing with reference to these remarks.

THE 22ND JANUARY 1859.

C. B. TREVOR, D. I. MONEY, and G. LOCH, Esqs., Officiating Judges.

Case No. 51 of 1858.

Petition for Review of Judgment passed by Messrs. C. B. Trevor, D. I. Money, and G. Loch, in case No. 109 of 1854, decided on 30th November 1857.

Mr. David Andrew, (Appellant,) *Petitioner,*
versus

Rajah Suttees Chunder Deb Roy, (Respondent,) *Opposite Party.*

Mr. R. T. Allan, for Petitioner.

Baboo Kishenkishore Ghose, for the Opposite Party.

Application for review of judgment refused, inasmuch as it was competent to plaintiff, when the case was first before the Court, to produce the evidence, which he now desires to have admitted, and not having then produced it, he cannot be allowed now to tender it.

AN application for a review of the judgment* of this Court, passed on the 30th November 1857, adverse to him, has been made by Mr. Andrew, the plaintiff in the court below. It is urged by the counsel appearing on his behalf, that the decision of this Court, and also that of the lower court, were founded on a misconception of the plaintiff's case: that that case was based not on the letter dated 28th Maugh 1248, but on that dated 28th Phalgun 1241; that the latest in date was only a confirmation of the contract entered into and acted upon by the rajah, when a minor, and Mr. Andrew; that the view taken by the Court of the case has excluded a mass of evidence, as to payments under the contract, which would have given to the confirmation of the 28th Maugh 1248 a clear and distinct meaning, even supposing that its terms, when read alone, were not so clear as they might have been; that, moreover, a contract entered into by a minor is good, unless it be repudiated by him after his coming of age; and, consequently, the original contract and the confirmation together form one cause of action, regarding the whole of which evidence should have been before the Court, which was not the case; that, consequently, the case should be remitted, in order that the evidence to those payments might be put in by the plaintiff, and the whole subject re-considered after such important evidence, documentary and oral, have been placed before the Court.

We have turned to the record for the purpose of seeing whether there is any valid ground for the allegation of the learned advocate, and have found none. Amongst the issues drawn up by the principal sudder ameen, under the provisions of Section X. Regulation

* See *Sudder Dewanny Decisions* of 1857, page 1693.

XXVI. of 1814, is the following :—“ Besides the contract entered into between plaintiff and the defendant's father, for bearing the charges of the aforesaid suit, was any fresh agreement interchanged between plaintiff and defendant, on the 28th Phalgun 1241 B. S. ? With reference to the costs of the said suit, did the defendant take from the plaintiff rs. 15,007 at different times, as alleged by the latter? And did he, on the 20th Maugh 1248, after attaining majority, execute a writing under his seal and signature, acknowledging the receipt of the above sum, and promising to repay the same ?”

This issue was sufficiently large to admit of evidence on every point alleged in the plaint. It appears, however, from the decision of the principal sudder ameen, that the plaintiff in the court below rested his claim mainly on the letter dated 20th Maugh 1248, that is, on the act of confirmation by the rajah; and that, consequently, the principal sudder ameen decided the case on a consideration of the document relied on by the plaintiff before him.

Referring to our own judgment, we would observe that, at the time of the hearing of this case, we had, and at the present moment have no doubt that a contract like that alleged to have been entered into by the defendant, when a minor, was voidable only, and not actually void, and liable to be confirmed or repudiated by him, at his election, after he had arrived at years of legal discretion; and also that, for the ratification of a contract made during infancy, a mere acknowledgment was not sufficient, but that there must be either an express promise to pay, or such a direct confirmation as expressly ratifies the contract, although it be not in the language of a formal promise. The Court was, consequently, quite ready to hear evidence as to the original contract and payments under it, as well as to determine the exact meaning to be given to the document which was put forward by the plaintiff as a deed of confirmation; but no such evidence was tendered. The pleaders for the plaintiff in this Court, as in the court below, rested their case mainly upon the terms of the aforesaid deed; and having failed in convincing the Court, that it conveyed any promise to pay a sum, received under a contract entered into by the rajah when a minor, it is now too late to come to the Court, and ask it to receive evidence which it was always competent to them to put in, but which they elected not to file. Moreover, in the course of our judgment, we remarked that, “ looking to the terms of this letter, we see no promise on the rajah's part to pay to the plaintiff rs. 15,007, with interest. The language of the letter when taken alone is certainly indistinct; but it was in the power of the plaintiff, by extrinsic evidence, to clear up the ambiguities that exist in it. Had the plaintiff filed a copy of the account sent by him with the letter now produced, or had he filed a copy of his own letter, to which that of the rajah is an answer, we should have clearly seen our way to the interpretation of the letter. The plaintiff has voluntarily chosen

to leave the letter to explain itself, and he must suffer the consequences of the line of conduct which he has adopted." It may be that the case of the plaintiff has been put before the Court in a mode not the most advantageous to him. Whether that be the case or not, we cannot enquire; but we have no hesitation in holding that, even if it were so, we should not be justified in granting a review of our decision, in order to enable the (plaintiff) appellant now to place his case before the Court in a state in which, acting under advice, he did not in the first instance think fit to put it.

Under the view of the present application expressed above, we see no reason for acceding to it, and reject it, with costs.

THE 22ND JANUARY 1859.

C. B. TREVOR, D. I. MONEY, and G. LOCH, Esqs., Officiating Judges.

Case No. 47 of 1858.

Petition for Review of Judgment passed by Messrs. C. B. Trevor, D. I. Money, and G. Loch, in case No. 382 of 1854, decided on 30th November 1857.

Must. Chundermonee Debea, (Respondent,) *Petitioner,*
versus

Messrs. Frith and Sandes, (Appellants,) *Opposite Party.*

Baboo Dwarkanath Mitter, Kishensukha Mookerjea, and Mr. J. W. B. Money, for Petitioner.

Mr. G. S. Fagan and Baboo Jugdanund Mookerjea, for the Opposite Party.

Application for review of judgment rejected, the Court seeing no reason to doubt the correctness of its former ruling, and the express tenor of Act XV. of 1853 forbidding the opening in appeal of any point not involved in the appellant's appeal, without a formal appeal on the part of the respondent.

AN application for a review of the judgment* of this Court, passed in the case of Messrs. Frith and Sandes, (defendants,) appellants, *versus* Chundermonee Debea, (plaintiff,) respondent, has been made to us on behalf of the (plaintiff,) respondent, Chundermonee Debea.

She, through her counsel, Mr. Money, urges that, although she did not appeal from that portion of the decision of the principal sudder ameen, releasing Messrs. Hill, Savi and Co. from liability, as under Clause 3, Section VII. Act XV. of 1853, she ought, strictly speaking, to have done; still, as the Court has adopted a new view of the law on the point at issue in the suit, a view which the learned counsel was not prepared to question; still, as the consequence of that new view is, that his client has failed in her suit, both against Messrs. Hill, Savi and Co., on whose account the bond was originally executed, and who received the consideration money for it, and the present owners of the factory, Messrs. Frith and Sandes—a

* See *Sudder Dewanny Decisions* of 1857, pages 1720 to 1726.

state of things, which, as the genuineness of the bond on which the suit is instituted, has been unquestioned by the defendant, amounts to a denial of justice—the Court should, under the circumstances, have looked into the whole case, and if the liability of the appellants before it, Messrs. Frith and Sandes, was not made out, have then given the plaintiff a decree against those parties who were undoubtedly personally liable; that, consequently, the Court should review its judgment with a view of doing justice to the plaintiff in the suit.

We are clearly of opinion that it is not in the power of the Court to act as suggested by the learned counsel. The court below released Messrs. Hill, Savi and Co. from liability, and declared Messrs. Frith and Sandes liable. Now on this party appealing against the decision of the lower court, it was clearly imperative on the plaintiff, if she wished to re-open the question of Messrs. Hill, Savi and Co.'s liability, under the terms of the law cited by the learned counsel, to appeal against that portion of the decision of the principal sudder ameen declaring their non-liability; and not having done so, she must be considered to have acquiesced in that portion of the decision, and the only issue before the Court was the liability of Messrs. Frith and Sandes, an issue which was answered by the Court in a mode the correctness of which it sees no reason to doubt.

As to the argument that, as the law laid down by the Court was new, and took the plaintiff by surprise, therefore the appeal should have taken cognizance of the whole case of the plaintiff, the Court observes that it is not quite correct to designate the view of the Court as a novel one. It was in principle identical with that held in a suit decided by the Court in 1852, whereas the decision, in which the principle laid down was opposed to our ruling, was passed in 1848. On the united grounds, therefore, that its view was supported by a recent decision, and that the principle involved in the earlier decision seemed defective, while that in the later one was sound, the Court came to the determination at which it arrived; but granting that the law on the point in issue was not settled, but still doubtful, we are of opinion that that uncertainty can give the Court no warrant for setting aside the express terms of the law of appeal, and that, as before observed, when the defendants, Messrs. Frith and Sandes, appealed against the decision of the lower court as to their liability, it was clearly incumbent on the plaintiff, if she wished the point to be opened, to have appealed against that portion of the decision releasing Messrs. Hill, Savi and Co. from liability; and not having done so, she must suffer the penalty of her own negligence.

Under the view of the case expressed above, we reject the application, with costs.

THE 24TH JANUARY 1859.

B. J. COLVIN, ESQ., Judge, and C. B. TREVOR and G. LOCH, ESQS.,
Officiating Judges.

Regular Appeals from the decision of Baboo Oopendur Chunder Nyaruttun, Principal Sudder Ameen of Zillah Jessore, dated 30th June 1856.

Case No. 479 of 1856.

Greeschunder Ghose, (Plaintiff,) *Appellant,*
versus

Rutnessur Pal Chowdree and others, (Defendants,) *Respondents.*
Baboos Shumbhoonath Pundit and Bungsheebuddun Mitter, for Appellant.
Baboos Ramapersad Roy and Kishenkishore Ghose, for Respondents, Rutnessur Pal Chowdree and Oomachurn Pal Chowdree.
Baboo Sreenath Doss, for Respondents, Greejapersad and Muthoor-nath Ghose.

Case No. 486 of 1856.

Rutnessur Pal Chowdree and Oomachurn Pal Chowdree, (Defendants,) *Appellants,*
versus

Greeschunder Ghose, (Plaintiff,) and Jugodumba Dasseea and others, (Objectors,) *Respondents.*

Baboos Ramapersad Roy and Kishenkishore Ghose, for Appellants.
Baboos Shumbhoonath Pundit and Bungsheebuddun Mitter, for Plaintiff, Respondent.

Suit for wasilat accruing during pendency of a former suit. Claim held not to be barred by C. O. of 11th January 1839, as plaintiff could not sue before a particular assignment in his favor. Another plea in bar, that plaintiff could not sue in the life-time of the party who made the assignment, for she had previously parted with her rights, overruled for the reasons stated. Defendants' statement of

THIS was a suit for wasilat from Bysakh 1248 to end of Cheyt 1251, amounting to rs. 49,851-5-4, principal and interest.

The principal sudder ameen has decreed in part, and dismissed in part ; hence there are cross appeals by plaintiffs and defendants, respectively.

We have already had a case No. 155 of 1857, between the same parties before us, from the judgment given in which, dated the 15th instant, the following narrative of the family history is taken as elucidatory of this suit :

“ Kaleepersad and Doorgapersad were the two sons of Dyram Pal Chowdree. Kaleepersad left a widow, Shusheemookhee, mother of Jugodumba ; while plaintiffs were the sons of Doorgapersad. Door-gapersad professed to have had his brother's estate left by hibbanamah to him on his death, in 1200 B. S, when Shusheemookhee, having sued to set it aside, a compromise was entered into between her and Doorgapersad, by which he assigned certain lands, inclusive of a mehal, Bhurutpore, and other articles of property, movable and immovable, for her support ; so that she filed a ladavee,

dated 28th Jeyt 1211, and the case was disposed of accordingly on the 13th May 1805. Again, Jugodumba sued Doorgapersad with the same object of setting aside the hibbanamah and the deed executed by her mother, on the ground that she could not be bound by her act : in that suit Doorgapersad satisfied Jugodumba also by the assignment to her of some property for maintenance, whereupon a deed of compromise was executed dated 29th Srawun 1225, and the suit was adjusted in the provincial court on the 12th August 1818. Jugodumba, however, had two sons, Greeschunder and Hurchunder, already named, and these, in their turn, sued the present plaintiffs, sons of Doorgapersad, and their own mother, to set aside the hibbanamah put forward by Doorgapersad and the compromises executed by Shusheemookhee and Jugodumba, and succeeded in the zillah court on the 22nd August 1843, the decree of which court was affirmed in appeal by this Court on the 24th August 1844."

wasilat, in absence of proof of the amount by plaintiff, accepted. Poojah expenses allowed in account.

In execution of the above decree, possession was obtained by the plaintiffs, Greeschunder and Hurchunder, the former of whom, the latter being dead, instituted this suit on the 17th February 1853, or 5th Cheyt 1259, for wasilat accruing during the pendency of the former suit, which had been brought in Cheyt 1247, i. e. for wasilat from Bysakh 1248 to end of Cheyt 1251.

As already stated, cross appeals have been preferred. That of the defendants, No. 486 has first been gone into, on the ground that, if successful, it will render consideration of the appeal on the part of the plaintiff unnecessary.

Several objections to the claim have been put forward. Amongst others, that the suit is barred by circular order of the 11th January 1839. This was a plea put forward in the court below, where, it is apparent from the decision, that an issue founded upon it was drawn up for adjudication, but without any determination of it. The plea has not been specifically repeated amongst the grounds of appeal filed by defendants; but in the course of the opening of their case, their pleader has solicited permission to put it in, contending, at the same time, that it was implied in their third ground of objection to the decision of the principal sudder ameen, that, on reference to the special facts of the case, the present claim to mesne profits is invalid. Without admitting this inference to be correct, the majority of the Court, Messrs. Colvin and Loch, ruled that the plea might be argued, as it had been prominently advanced in the answer filed below, and had been, although made an issue by the principal sudder ameen, overlooked by him in his final decision. At the same time the Court at large were of opinion that the case need not be remanded for adjudication of the issue. They, therefore, heard the argument upon it.

The nature of the plea may here be stated, that this claim for wasilat cannot be allowed, as it should have been included in the

previous suit brought by Greeschunder and Hurchunder, which was one for possession, in execution of the decree passed in which, according to the plaintiff's own admission in this case, possession had been obtained, and, as the claim for wasilat had not been so included, it must be held to have been waived.

In judging of this plea, we must consider the nature of, and circumstances connected with, the previous suit, decided in 1844. It was instituted on the 18th February 1841 by Greeschunder, the present plaintiff, and Hurchunder, sons of Jugodumba, who was made one of the defendants in it. The plaint did not originally contain a distinct prayer for possession : it only set forth the plaintiffs' rights as reversionary heirs, and sought that the hibbanamah purporting to be from Kaleepersad to Doorgapersad, and the subsequent compromises by Shusheemookhee and Jugodumba, might be annulled. Jugodumba did not file an adverse answer, but, on the 19th July 1843, she presented a petition to the effect that she should not have been made a defendant, as she denied the deeds in question ; and she was willing that plaintiffs should be put in possession as they desired. On the 21st August following, the plaintiffs filed, what cannot be properly termed, a supplementary petition, although it was designated as a "*tuttima soal*" by the principal sudder ameen in his decree, with the view of making more specific the object of their suit, *viz.* to obtain possession, founded mainly on the assent of Musst. Jugodumba to its being given. The decretal order was, therefore, one which awarded possession, and possession was obtained in execution of the decree. Now, it is argued, that the circular order of the 11th January 1839 being in force when the suit was instituted, wasilat also should have been applied for ; but the position of the plaintiffs was not such as at the time of instituting the suit justified their applying for wasilat. They had, while Jugodumba lived, no independent rights of their own. They sued in the first instance to have the deeds cancelled, which impeded their rights as reversionary heirs ; and when they, subsequently, by their petition of the 21st August 1843, applied for possession, they could only hold possession as trustees for Jugodumba, and could have no retrospective rights, as such, anterior to the date of their being acknowledged in that character by the decree in question. On the 24th January 1853, that is, before the institution of this suit on the 17th February following, Jugodumba, by what may be called a deed of relinquishment, assigned, with other property, her right to wasilat from Rutnessur and Oomachurn, and her claims upon others to the present plaintiff, in consequence of which this action has been brought, an action which, without the assignment in question, could not have been sustained by plaintiff. Rejecting, therefore, the plea that this suit is barred by circular order of the 11th January 1839, we pass on to another plea

for the dismissal of the suit, which is, that plaintiff cannot sue in Jugodumba's life-time. In support of this plea, it is argued that the deed of relinquishment adverted to could not convey any right to plaintiff greater than Jugodumba herself possessed, whereas she had put the defendant's father, Doorgapersad, into possession by her own act of compromise in 1818, and, therefore, there had been no wrongful possession as against her, besides which, the decree of 1844, although it nullified the hibbanamah and deeds of compromise as between the parties to that suit, *viz.* the present and then plaintiff, Greeschunder, and the present and then defendants, Rutnessur and Oomachurn, did not invalidate the act of Jugodumba as between herself and the then defendants. But we consider that these arguments cannot avail the defendants in bar of this suit ; for not only it may be said that the decree in question judicially cancelled, to all intents and purposes, the deeds in question, but also it is seen by the case, which we have already alluded to, as decided on the 15th instant, that the defendants have sued to recover from plaintiff what they now consider themselves entitled to in consequence of the cancellation of the deeds. They cannot, therefore, plead in this suit that the deed of compromise by Jugodumba should prevent plaintiff from all benefit by the deed of relinquishment, as Jugodumba had nothing to assign ; and we accordingly reject this plea.

We now proceed to consider the decision of the principal sudder ameen as to the amount of wasilat decreed to plaintiff. The claim was for

rs. 24,625 10 8 principal, and
rs. 24,625 10 8 interest,

total, rs. 49,251 5 4, whereas the principal sudder ameen has decreed only rs. 6220 principal, and rs. 6980 interest, and both parties have appealed.

We will consider, first, the plaintiff's appeal on this point. The principal sudder ameen has recorded that he put in no documentary proof but the decree of 1843 and the deed of relinquishment, and his oral evidence was untrustworthy ; and that, although an ameen was sent for local investigation, he was obliged to return without giving any results of it, in consequence of the default of plaintiff. The principal sudder ameen could only, therefore, allow such amount of wasilat as he could gather to be due from the admissions of defendants.

Plaintiff has objected in appeal that the ameen's return was made on the 23rd June 1856, and that the case was decided on the 30th of

that month, without accepting from him certain documents as to the amount of wasilat which he had ready to present. He has, therefore, applied that they may be received and considered now. To this, however, we cannot accede, as it is not enough to say that the case was decided hurriedly after the report of the ameen, for it was the duty of the plaintiff to file the papers in question, when proof was first called for by the Section X. proceedings, on which occasion he supplied only the documentary evidence above adverted to and the evidence of witnesses, whose depositions we have now had read to us, and which we see no reason to put faith in, for the witnesses describe the amount of wasilat chiefly from hearsay, and evidently were not in a position to become acquainted with the proceeds of the estates.

Another point taken in appeal by plaintiff is, that the defendants, other than Rutnessur and Oomachurn, *viz.* Bamasoonderee and others, have been excused, whereas they have themselves allowed that they are in possession of four villages, and plaintiff has been charged with their costs. The pleader for those parties has argued that they are the descendants of a daughter of Doorgapersad, and have the villages for support, and are only *pro forma* defendants. They represent also the assets of their villages to be rs. 923-9, of which, after deducting rs. 92-8 for expenses of collection and rs. 795-11-15 for sudder jumma, there remain only rs. 35-5, which are appropriated to mooktears' fees and other necessary expenses. We cannot, however, absolve these respondents, defendants, as, although they have been sued generally with the other defendants, they have admitted their separate possession of four villages. We, therefore, dismiss the appeal on the part of plaintiff, with costs, for enhancing the amount of wasilat from Rutnessur and Oomachurn, and decree against Bamasoonderee and other occupants of the four villages, upon the principle which will hereafter be declared.

With reference to the case of Rutnessur and Oomachurn, appellants, we find that the principal sudder ameen has taken their valuation of assets for 1248 as the basis of decree against them. These were admitted to be rs. 3110, after expenses of collection, charges upon the estate, &c. He, therefore, after deducting half as the right of Rutnessur and Oomachurn, gave the other half to plaintiff, or rs. 1555, yearly, amounting for four years to rs. 6220. To this the defendants object that this amount of profit does not remain to them, and reference is made to the answer to show the disbursements for poojah, &c., of which one year's accounts may be given as a sample. Out of the rs. 3110, there were applied rs. 1383 to poojah expenses and rs. 519 to wages of mooktears,

sudder mohurrirs, and buffalo herds. We find that, by defendants' own showing, the accounts were as follows :—

1248...Collections	...	...	...	rs.	14,257
„ Disbursements...	...	...	...	„	11,147
	Balance	...	...	rs.	3,110
1249...Collections	...	...	...	„	15,490
„ Disbursements...	...	...	...	„	11,472
	Balance	...	...	rs.	4,018
1250...Collections	...	...	...	„	14,282
„ Disbursements...	...	...	...	„	11,172
	Balance	...	...	rs.	3,110
1251...Collections	...	...	...	„	10,582
„ Loan	...	...	...	„	3,700
				rs.	14,282
Disbursements...	...	...	...	„	11,172
	Balance	...	...	rs.	3,110

And out of the balance of each year there are charges of the nature above described. It is plain that plaintiff must be bound by these accounts, for he has given no proof on his part of the proper amount of wasilat, nor has he afforded any disproof of what defendants have alleged it to be. The several items of disbursement must, for the same reason, be accepted as put down by the defendants. It follows that the only question which remains for consideration is, whether the several charges asserted by defendants should be allowed or not? We are of opinion that those for the poojahs may be allowed, as they are for the family purposes, in which both parties have a concern. Thus, taking the accounts of the year 1248 as an example, we deduct from the balance of rs. 3110 the sum of rs. 1383, expended on the different poojahs, leaving rs. 1727, of which half, or rs. 863-8, is due to plaintiffs. Upon this principle the accounts for the other years will be adjusted as between plaintiff and defendants Rutnessur and Oomachurn, with this proviso that, as the disbursements for revenue for 1851 exceeded the collections by rs. 590, and defendants had to borrow to make up the deficiency, they are entitled to half that sum as a deduction from the wasilat payable by them for the three preceding years. Of the balance of the sum borrowed by defendants in that year, we can take no cognizance in this suit.

The account with Bamasoonderee and others will be regulated on the same principle. From the balance of rs. 35-5, as shown by them, any disbursements for poojah, as now entered in the accounts, will be allowed in their favor, but not the other items of mook-tears' fees, &c., and whatever may thus be charged against Bamasoonderee and others, will be deducted from what is recoverable from Rutnessur and Oomachurn, as the four villages are also in their accounts, as plaintiff cannot recover twice for the same villages.

We refuse interest previous to suit, with reference to the delay in bringing this suit. Costs will be chargeable to the parties, respectively, in proportion to the amount now decreed and dismissed, and the principal sudder ameen's decree is modified accordingly in respect of both appeals.

THE 25TH JANUARY 1859.

H. T. RAIKES and A. SCONCE, Esqs., Judges, and H. V. BAYLEY, Esq., Officiating Judge.

Case No. 574 of 1857.

Regular Appeal from the decision of Mr. H. S. Thompson, Principal Sudder Ameen of East Burdwan, dated 3rd March 1857.

Lukheemonee Mohuntee Thakooranee, (Plaintiff,) *Appellant,*
versus

Kheterprya and Russikanund Mohunt Thakoor and others, (Defendants,) *Respondents.*

Baboos Ramapersad Roy and Shumbhoonath Pundit, for Appellant.

Baboos Kishenkishore Ghose, Jugdanund Mookerjea, Unookool Chunder Mookerjea, and Ashootosh Chatterjea, for Respondents.

Suit laid at Company's Rupees 11,367-6a.-14g.-2c.

Where two brothers, A. and B., joint possessors, made over to C. possession of certain lands on consideration of his paying off their debt to D., it was not competent to C., or to B.'s heirs, under the circumstances of the case, to hold A.'s widow answerable to a further extent than one-half

THE plaintiff, representing herself to be the widow of one Govindanund, says that her husband, and his brother, Gopeekanund, inherited jointly their father's share of the ancestral property, and that, after her husband's death, she continued to reside with his brother, Gopeekanund, until family differences caused their separation; that Gopeekanund is dead, but before his decease, in collusion with the defendant, Russikanund, under cover of a lease granted to the latter, he dispossessed her of her husband's share of the joint property, and she sues to recover the same from Kheterprya, his widow, and Russikanund, making other parties *pro forma* defendants.

Kheterprya admits that the plaintiff is heir to her husband's share of the property, but that, after Govindanund's decease, the plaintiff conveyed all her rights and interests to her husband,

Gopeekanund, for the sum of rs. 5000; that the two brothers had, during their life-time, borrowed the sum of rs. 7700 from one Radhanath, and given him a lease of mouzah Dhunooa, from 1252 to 1275, to repay himself from the proceeds; and, again, her husband, Gopeekanund, had leased their share in the village to Russikanund for rs. 9000, and their share in another village, called Barasimool, at the same time, in 1258, for rs. 5000, both leases to run until 1291, and with the amount, rs. 14,000, he had cleared off Radhanath's debt and other joint liabilities of the two brothers, and had subsequently discharged this debt, and obtained from Russikanund a farkhutee, or deed of release, in acknowledgment of payment in full, though Russikanund still continued to hold over the property.

of the liabilities incurred by A. and B., nor to deprive her of her share in the lands on account of liabilities created by B. himself over and above the joint act of himself and brother.

Russikanund defended his possession of the two villages, as in accordance with the leases held by him, and for which he had paid to Gopeekanund the sum of rs. 14,000, and asserted the right of Gopeekanund to raise the money on the security of this property, by which means the balance of Radhanath's debt had been paid off and other joint liabilities of the brothers discharged. He denied the farkhutee pleaded by Kheterprya, and accused her of promoting the suit with the object of establishing this spurious farkhutee, and recovering possession of the villages before the expiry of the lease.

The principal sudder ameen has held that plaintiff had not proved her possession subsequent to her husband's demise; that Russikanund had established both by the plaintiff's admission, and by showing that he held copies of the leases (the originals having been lost, though duly registered), that he had paid off the balance of Radhanath's debt, and had procured for himself fresh leases of Dhunooa and Barasimool from Gopeekanund, and held possession under them; and that Kheterprya had been unable to prove the authenticity of the farkhutee set up by her, or of the purchase by her husband of the plaintiff's interests for rs. 5000. He, therefore, decreed a declaration in favor of plaintiff's rights to four annas of the property in suit as the share of her deceased husband, and awarded her possession of such part as was not included in Russikanund's leases, any interference with which he held to be inadmissible, until the money for which they were granted had been repaid in full.

From this decision an appeal has been preferred by the plaintiff; and Baboo Ramapersad Roy, on her part, has urged that, as Russikanund's loan to Gopeekanund was made after his brother, Govindanund's death, the leases granted by him for their joint shares in mouzah Dhunooa and Barasimool could not be binding upon the share which, by the death of her husband, Govindanund, had devolved upon the plaintiff; that there was no proof on the

record to show that she had taken any part in the transaction, or that the loan had been contracted in payment of joint liabilities of the two brothers; that the recital contained in those leases does not show that the transaction was even connected with the debt previously contracted with Radhanath, and the appellant has asserted that she paid off her husband's share of it—hence it is argued for the appellant, that Gopeekanund's acts cannot be held to have compromised appellant's rights in any way, and that her entry into possession of the property cannot be postponed until Russikanund's leases expire, nor can she be called upon to discharge any part of the debt due to him.

No pleas having been raised before us in appeal to question the other facts found by the lower court's judgment, we have only to consider the case as between the plaintiff and Russikanund; and this raises on the merits the following issue only :

Whether the leases granted by Gopeekanund in 1258 to Russikanund entitle him to hold possession, during the period of their continuance, of the four annas share in the villages pledged, which devolved on the plaintiff, after the death of her husband, Govindanund?

Although it is admitted that these leases do not recite in terms that they were granted by Gopeekanund in lieu of the first lease for Dhunooa, executed in 1252 in favor of Radhanath, yet we find that Russikanund holds that lease, with an endorsement thereon that he paid the sum of rs. 6925 to Gopeekanund as balance due to Radhanath on account of the rs. 7700 lent by him, and secured on the lease of Dhunooa in 1252; and as there is no assertion that Radhanath's debt is unpaid, or that his lien on the mouzah still exists, the natural presumption is, that the debt was thus extinguished and the mortgage paid off with Russikanund's money. The equitable requirements of such an arrangement would be, that Russikanund should succeed to the same security as the creditor, whose debt he discharged, held, and that the lease given to him would be given with that object. It has been argued, however, that no such intention can be inferred, because the new leases do not disclose it, and the loan was a loan to Gopeekanund, and far in excess of the balance due to Radhanath, and no legal privity between plaintiff and Russikanund on that account is established. But we think there is sufficient ground for a different conclusion, on the inference deducible from the fact of Russikanund's now holding Radhanath's lease with his endorsement. From this it is evident that Radhanath thereby made over to Russikanund whatever title he had over the property pledged to him, and thus became a party to the second transaction, and, with this link connecting the two loans, we cannot possibly regard them as unconnected with each other. It is true that one of these leases

grants Dhunooa to Russikanund up to 1291, while Radhanath's lease was only up to 1275, and the other grants Barasimool to 1291 also, while Radhanath had no lease at all of that mouzah : these leases, consequently, exceed the first, both in extending the time as regards Dhunooa and being altogether new as to Barasimool.

As, then, it is admitted by the plaintiff, that her husband, Govindanund, was a party to the loan contracted with Radhanath to the extent of one-half of the liability ensuing, we think all such liability still existing on that account must be binding upon his widow as his representative, and, consequently, that Russikanund's lien on the plaintiff's share of Dhunooa must continue to bind *that* property during the period for which Radhanath's lease was created, that is to say, until 1275, unless the entire amount due to Radhanath in 1252 be previously liquidated. Any liability created by Gopeekanund, in excess of that which previously existed as the joint act of Gopeekanund and his brother, and in furtherance thereof, cannot be to the prejudice of the plaintiff ; and we, therefore, restrict the judgment below in favor of Russikanund to his lien on plaintiff's share of Dhunooa up to 1275, unless the whole ra. 6925 and interest be intermediately discharged, and declare plaintiff entitled to take possession at once of her husband's share in Barasimool and in all the other property in suit.

As to costs, the plaintiff is entitled to a proportionate share for Barasimool and the other property in suit, excepting Dhunooa, from the defendant in possession thereof, and the costs for Dhunooa will be paid by her.

THE 25TH JANUARY 1859.

A. SCONCE, ESQ., Judge, and G. LOCH and H. V. BAYLEY, ESQS.,
Officiating Judges.

Case No. 211 of 1857.

*Regular Appeal from the decision of Mr. A. Littledale, Judge of
Shahabad, dated 5th December 1856.*

Mr. R. Solano, (Plaintiff,) *Appellant,*
versus

Musst. Roop Kooar, (Defendant,) *Respondent.*

*Baboo Shumbhoonath Pundit, Mr. R. Norris, and Moonshee
Ameer Ali, for Appellant.*

*Mr. R. T. Allan and Moulvee Aftabooddeen Mahomed, for Re-
spondent.*

Suit laid at Company's Rupees 3876.

This suit was instituted to recover possession of a share of a village which had been leased to plaintiff for eight years, in consideration of a cash advance, and from which the lessor, defendant, had ousted plaintiff, on an arrear of rent being decreed to be due.

Held, that lessor, defendant, with reference to Clause 4, Section XVIII. Regulation VIII. of 1819, was competent to oust the lessee, and that, as a distinct provision is made in the lease, that, in the event of the dispossession of the lessor, his advance should be repaid from other sources, the lease of plaintiff was not irrevocable.

PLAINTIFF (appellant) brought this suit to be restored to possession of one-fourth share of mouzah Mongaon, which had been leased to him by defendant, and from which he had been ousted. The lease mentioned ran for eight years, from 1256 to 1263, at the rent of rs. 400 per annum; and as consideration for granting the same, plaintiff had lent rs. 500 to defendant, the lessor. This loan was set forth in the deed, and also the arrangement made for its repayment. It was intended that the principal, with interest, should be discharged in the course of the eight years over which the lease extended. Assuming the interest due from time to time on the outstanding principal to be rs. 270, the total sum, for the repayment of which provision had to be made, amounted to rs. 770. Thus, in the first year of the lease, 1256, out of the whole rent, rs. 400, payable by the tenant, the sum of rs. 122-8 was to be retained by him in repayment of the loan, and rs. 278-8 to be paid in cash. For the second year rs. 115 was to be retained by the tenant, and rs. 286 to be paid as rent; and so on. Now it happened that the tenant (this appellant) fell into arrears for 1257, and, in consequence, the lessor (this respondent) sued him summarily for the amount, and acquiring a decree against the tenant for rs. 86 (in part of the sum claimed), proceeded to eject him from his farm. Later, the lessor instituted a regular suit to recover that portion of the claim which the collector had disallowed, and by the decision of this Court, pronounced on the 27th June 1855, the full amount sued for was awarded to her.

Such are the circumstances under which this suit has arisen. The claim has been dismissed by the zillah judge; and against that finding Moonshee Ameer Ali, for appellant, laid before us two

pleas. *First*, it was contended that the judge has erred in assuming that respondent, the lessor, was competent, by Section XV. Regulation VII. of 1799, to oust her tenant; and, *second*, that the appellant was entitled to hold on the farm, as stipulated, to secure him for the repayment of his loan.

Upon the first point it appears to us that the legal competency of the lessor to eject a defaulting tenant is unquestionable. This power was first recognised in Clause 7, Section XV. Regulation VII. of 1799, and was expressly provided for in Clause 4, Section XVIII. Regulation VIII. of 1819, which declares that, when an arrear may be adjudged (in a summary suit) to be due, the zemindar or other plaintiff shall be at liberty to cancel, of his own authority, any lease or farm intermediate between himself and the actual cultivator, on account of which the rent may have been claimed. And again, as to the second point, it is distinctly met by the terms of the lease itself; for in this deed there is a specific condition, that, if the lessee should, under any circumstances, be dispossessed of the land, the lessor should make good what might be due to him for the advance, interest or profit, out of other sources. This clause is opposed to the assumption of an irrevocable occupancy of the farm for eight years, and indicates, as an understanding between the parties, that appellant, the lessee, might have to be repaid his loan by other means than by the assets of the farm. For these reasons we dismiss the appeal, with costs.

THE 25TH JANUARY 1859.

H. T. RAIKES and A. SCONCE, Esqs., Judges, and H. V. BAYLEY, Esq.,
Officiating Judge.

Case No. 502 of 1857.

*Regular Appeal from the decision of Sreenath Biddyabagish,
Principal Sudder Ameen of Backergunge, dated 6th
August 1856.*Kalee Kishen Roy Chowdree and Oomakunt Roy Chowdree,
(Defendants,) *Appellants*,*versus*Chundurkant Mookerjee, (Plaintiff) and others, (Defendants,) *Re-
spondents*.*Baboo Unookoolchunder Mookerjee and Mr. R. T. Allan, for
Appellants.**Baboos Ramapersad Roy and Kishenkishore Ghose, for
Respondents.*

Suit laid at Company's Rupees 16,987.

Mr. H. T. Raikes.—The plaintiff, in this suit, having purchased, in 1244 B. S., at a sheriff's sale, the zemindaree of Boorha Mozumdar Jowarree, in pergunnah Buzoorg Omedpore, got possession by a decree of court in 1255 B. S., and brought this suit to assess a dependent talook, held by the defendants, for the rent of 1259 B. S., calculating the lands at 200 droons, at rs. 8 per kanee, making an annual jumma, after deductions, of rs. 23,040.

The principal sudder ameen has awarded to plaintiff the sum of rs. 16,987 as rent for 1259, being at the rate of rs. 8 per kanee for the land then in cultivation; and against this award and rate of assessment the defendants have come up in appeal.

The dependent talook in question was originally created in 1202 B. S. as a junglebooree tenure, and granted to the defendants' ancestor, by Trilochuna, the widow of the proprietor of Boorha Mozumdar Jowarree, and mother of the then minor proprietor, under a pottah, which provided that the pottadar should remain unassessed for twelve years, for all lands cleared by him during the interval, and during ten years for all the lands then uncultivated; after which periods the cultivated lands, after providing for certain deductions, were assessable at the fixed rate of $5\frac{1}{2}$ annas per kanee.

In 1208 B. S., or six years after the creation of the tenure, the parent estate, Boorha Mozumdar Jowarree, was sold for arrears of revenue, and purchased by Toolseeram Ghose. It is not denied that the Government sale must have cancelled the pottah, but it is alleged by the defendants, that Omersunkur, the naib of the purchaser, granted to defendants' ancestor a deed in 1209 B. S., confirmatory of the

In a suit by a zemindar for enhancement of the rent of a dependent talook possessed by defendants, appellants, it was held by the Court unanimously, that the service of notice by the plaintiff had been proved, and that the defendants had failed to establish the validity of the deeds under which they professed to hold the land at a guaranteed rate of assessment. But with respect to the enhanced assessment to be imposed, it was determined by a majority of the Court, that the case should be remanded to the principal sudder ameen for complete enquiry upon that point; and also, with the

pottah of 1202, with the exception of certain lakhiraj lands, and the grantee, therefore, remained in possession, and unaffected by the change of proprietors.

In 1228 B. S. the heirs of Toolseeram having divided his property amongst themselves, and the tenure of defendants having fallen to the share of Bhowaneepersad, he granted them a fresh pottah in that year, confirming the previous deeds, and conveying to them some further privileges within the tenure, and defining the extent of the land then cultivated at 48 droons 4 kanees, at a jumma of rs. 265-8.

In 1244 the estate of Boorha Mozumdar Jowarree was purchased at a sheriff's sale, by the plaintiff, as the property of Hureepersad Ghose. Plaintiff, however, could not, at that time, establish himself in possession; and the old proprietor, still continuing to hold the estate, made the usual enquiry into the progress of the tenure in 1246 B. S., and finding it to comprise 127 droons 4 kanees of land under cultivation, assessed them at rs. 764-5a.-4g. at the pottah rates, including rs. 16 peadas' fees, and received the amount from defendants.

In 1255 B. S. the plaintiff secured possession of the estate by decree of court, and first sued summarily for rents at rs. 764-5a.-4g., which was unsuccessfully resisted by the defendants regarding the peadas' fees above mentioned; and, subsequently, he brought this action in 1259 B. S. for the present enhancement.

In addition to the above statement made by the defendants, we find from the record, that the kanees is calculated as comprising 5 common beegahs and 4 cottahs; that the area of the lands in dispute is about 14,000 beegahs; that the ameen sent out reported the rates to run from rs. 6 to rs. 10 per kanees, and that the quantity of land fit for assessment in 1259 aggregated some 159 droons, which have been assessed at rs. 8 per kanees.

The points we have to consider in the appeal are:

1. Whether plaintiff issued any notice on the defendants as required by Section IX. Regulation V. of 1812, the defendants denying the service of it.

2. Whether the pottahs pleaded by the defendants are proved, and entitle them to hold at the rate per kanees alleged by them; and,

3. Whether, if enhancement be allowable, the rates fixed upon by the lower court are just and proper rates for the lands in question.

As to the service of notice, we have the evidence of the peadas, who state that they served fourteen different notices with jumma-wasil-baquee accounts, by affixing them to the doors of the houses in which the defendants reside; and, although our attention has been requested to the inferior station in life of these witnesses, and the absence of the plaintiff's naib, who is said to have delivered these notices to the witnesses for distribution, and whose evidence, it is argued, should have been required, I see no ground whatever

instruction that as the plaintiff held a neemousut talook under defendant to the extent of one-third of their talook, the rent chargeable to defendant upon that land should be reckoned as a set off for rent payable by plaintiff to them, leaving defendant to their own remedy for a higher rate than may be due to plaintiff to them.

for discrediting their statements, as nothing can be more probable than that the plaintiff took the precaution of serving the notices as stated, and that, for the purpose of doing so, he or his agent employed such persons as the witnesses on the occasion. A perfectly legal service of the necessary notices then, I hold, with the lower court, to have been satisfactorily proved.

The next point is the validity of the pottahs, set up by the defendants as entitling them to hold the lands at the fixed rates therein recorded.

The original pottah of 1202 B. S. was not filed in the lower court, but, we are told, one of the defendants, Gungamonee, is now prepared to produce it. But as that pottah, unless confirmed by the subsequent deeds alluded to, has lapsed under the subsequent sale of the parent estate by Government in 1208, there can be no necessity for us to look at that document, until satisfied that the later ones were really granted. I therefore proceed to consider the evidence adduced in support of the instruments of later date.

One of them is dated in 1209, and purports to have been granted by one Omersunkur, as naib of Toolseeram Ghose, the new proprietor of Boorha Mozumdar ; but we are shown nothing in the shape of any authority under which such an instrument could have been granted by Omersunkur ; and, although litigation was going on between the defendants' ancestor and another party, when the Government sale took place, to establish the priority of their pottah of 1202 over another of 1203, set up by other parties, and that litigation only terminated in 1213 in the defendants' favor, we are not shown that Toolseeram, either directly or indirectly, assisted the defendants, or that the confirmatory pottah of 1209 was ever alluded to up to that time. Then we come to the later pottah of 1228, said to have been granted by Bhowaneepersad Ghose. The execution of this pottah is deposed to by two witnesses, who state that it was executed by Bhowaneepersad in Calcutta. But one of these is a common boatman, who says he accompanied the defendant when he went to procure the deed ; and the other is a servant of the defendants. The deed has never been presented at any time ; nor can the defendants show that, either in the time of Toolseeram Ghose, or of his heirs, any rent has been paid on the terms of *either* of these two pottahs recognised by the maliks, on any single occasion. Under these circumstances, I think it would be very unsafe to trust to the evidence of the two persons above adverted to as sufficient to establish the execution of the later deed, or to receive either of these instruments as proof that the pottah of 1202 had been ever recognised or acted upon since the sale of the original estate in 1208 B. S. I, therefore, agree with the principal sudder ameen, that the defendants have entirely failed to establish their right to hold the tenure at any guaranteed rate of assessment.

Then as to the rates of assessment approved of by the lower court, the current local rates of the neighborhood are stated by the ameen to range from rs. 6 to rs. 10 per kanee, and the principal sudder ameen has taken an average rate of rs. 8 per kanee as the basis on which to calculate a jumma for 1259 B. S., the year in question. The defendants have raised various objections to the ameen's rates in the court below, and also questioned the fairness of the ameen's proceedings during the enquiry, and impugned his motives, as is usual on these occasions. But, although the rates given in by the ameen are said to be the common rates of the locality, and the purgunnah of Buzoorg Omedpore is well known to comprise many other estates, regarding which settlements and assessments must be matters of common occurrence, defendants have not attempted to support their objections either in the court below or in this appeal, by referring to any such proceedings as proof of these rates being excessive; nor have they themselves definitely stated what should be the proper standard for calculating any other rates than those on the record. Defendants have, in fact, contented themselves with declaring the proposed rates to be excessive, and have called attention to the disproportion between those now assumed and the rates which plaintiff, who is acknowledged to hold a neem-ousut by purchase under themselves, in this same tenure, pays them at the present time, and receives himself, from his own under-tenant, the howaladar; that is to say, plaintiff, as neem-ousutdar, pays them only rs. 1-9, and receives from his own howaladar rs. 1-14 per kanee; and the pleader for defendants urges that, out of such receipts, it is impossible for his client to pay at the rate of 8 as. per kanee to the zemindar; and he points to these small rates as proof that the lands paying them hitherto cannot possibly be supposed capable of so large an increase. But, as observed by the lower court, there is no legal impediment to the defendants' raising the rents of the plaintiff's neem-ousut in proportion to the increase on their own ousut tenure, and, consequently, the present disproportion observed upon can be no real ground for the Court's guidance; and when it is considered that the jumma of rs. 16,987 has to be spread over some 14,000 beegahs of land, no very exorbitant rate is discernible.

So far then as the data afforded by this record allow the Court to judge, there is, in my opinion, no medium course for adoption. The Court must either take the rates tested and approved of by the lower court, or fall back upon the insignificant jumma assumed by the defendants, or make some *arbitrary* reduction of its own to strike a medium between them.

This the appellants have no right to expect. They have failed to place their objection before us in any form but that of denial or conjecture; and, as I see no reasonable ground for interfering with

the judgment passed below, I would uphold its conditions, dismissing this appeal, with costs.

Mr. A. Sconce.—I desire to express my concurrence in the grounds assigned by Mr. Raikes for rejecting the pleas, taken by appellants, as to the non-liability of their ousut talook to re-assessment. Appellants have failed to establish their right to hold the ousut on the favorable conditions asserted by them; and as plaintiff on the other hand has proved the service of notice, the enhanced rent for the year 1259 must be fixed and awarded. It seems to me, however, that the steps taken by the principal sudder ameen to ascertain the rent fairly assessable on the ousut talook, and the data adopted by him for that purpose, are inadequate to the determination of so important an issue. Hitherto the defendants, appellants, have paid only rs. 764 per annum, and the principal sudder ameen has assessed the talook for 1259 at rs. 16,987. In determining this rent, the principal sudder ameen has accepted the rate set forth in the plaint; but, at the same time, seems to state that he would have adopted the rates recommended by an ameen, but that the total rent so assessed would have exceeded the rate claimed by plaintiff.

In fact, we have no satisfactory data before us for determining the proper rate, so as to meet the objection raised by appellants upon this point. What the ameen says is, that so many people whom he questioned spoke to one rate, and so many to another. And of a similar character was the evidence delivered before the principal sudder ameen himself, the witnesses on the part of defendants, for example, declaring that the ordinary kursha or ryot's rate was from rs. 3 to rs. 4 a kanee. What we need, therefore, is some authoritative test, from which we should be able to distinguish between mere verbal statements which reduce the ryotee rate to rs. 3, and verbal statements which raise it to rs. 10. The principal sudder ameen, it seems to me, has not given this point sufficient consideration; and without binding him to any particular course, I would only suggest, that the parties should have an opportunity of substantiating before him, by documentary evidence, such as the results of Government assessments in the same neighborhood, or the assessments of private individuals, the rate of rent fairly assessable on this land.

The defendants, I observe, on the presentation of the ameen's report, took repeated exception to the ameen's proceedings, and the representations made by them have not been noticed by the principal sudder ameen. Two prominent objections taken were, that the rates had been largely over-stated by the ameen, and that this officer had withheld the depositions of several respectable witnesses.

Further, it must be remarked that, while the defendants hold an ousut talook, the plaintiff himself appears to hold about 50 droons

as a neem-ousut, subordinate to, and within the ousut of appellants ; and from the assent of plaintiff, to be inferred from the pleadings, as well as from the course of the argument before ourselves, it would also appear that plaintiff has not paid a higher rate of rent to defendants than rs. 1-9 a kanee. Clearly, if, from plaintiff himself, over one-third of the talook, the defendants draw only rs. 1-9 a kanee, they cannot be asked to pay plaintiff as zemindar rs. 8 a kanee. I do not say that the rent of the plaintiff's neem-ousut may not also be enhanced ; but, at any rate, the rent hitherto paid by him indicates the existence of rates much below the rate assumed by the principal sudder ameen, and offers a cogent reason for more careful investigation than the question has received.

I think also that, upon the principle that he who seeks equity must act equitably, it should be an instruction to the principal sudder ameen to consider so much of the rent, eventually charged to defendants, on that portion of the ousut which may be held by plaintiff as a neem-ousut, as a set-off, equivalent, so far as it goes, to the rent derivable to defendants from plaintiff. I do not mean that the plaintiff's neem-ousut should be assessed in this action ; but only that, as about one-third of the land upon which plaintiff claims an enhanced rent is in his own hands, the rent payable by defendants should be held also to be payable by plaintiff to them, leaving them to seek their own remedy for any higher rate that may be justly claimable.

Mr. H. V. Bayley.—I concur in considering the objections of the appellants, as to non-service of notice, and as to the sufficiency of their *istiklalee* pottahs, untenable for the reasons given in the judgment of Mr Raikes. The alleged original pottah has only been tendered now, and no sufficient reason has been shown for its non-production before. I would, therefore, not admit it in this stage of appeal. I cannot, however, concur in assuming the rates at which it is sought to assess plaintiff's land, *viz.* rs. 8 a kanee, to have been arrived at as satisfactorily as in this case is requisite.

It may be perfectly correct that with a kanee (as here) equal to 5 beegahs 4 cottahs, rs. 8 a kanee is not so heavy a rate as it might at first sight appear ; and that the record shows the rates for the lands of the tenure here in suit to vary from rs. 10 a kanee for the first, to rs. 7 for the fourth sort of land, and for kursha, or ordinary ryot's lands, from rs. 6 to rs. 10 : but the evidence to these rates is not that of independent holders or cultivators of similar tenures to that in suit in this case. More especially, I think that the rate now assumed of rs. 8 a kanee cannot be conclusively admitted, till the objections stated against it in the court below are gone into by the principal sudder ameen, and declared either futile or otherwise, after investigation, on sufficient grounds.

Those objections are precise, and have been consistently urged in petitions in the case, *viz.* that the depositions before the ameen, on which he has based his report of the rates, have been changed, and that the signature of the ameen's report is only of one colluding defendant, and not of the other parties to the suit.

These objections to the ameen's report should first be gone into; if they are baseless, the principal sudder ameen may record the fact, and then adopt the rate he thinks proper. If the defendants' objections to the ameen's proceedings are correct, another ameen should be sent out to enquire and report upon the proper rates.

I concur with Mr. Sconce in his concluding remarks, regarding the zemindar's claims in connection with his liabilities as the neem-ousutdar of the defendants, appellants.

I would remand the case for this purpose.

THE 26TH JANUARY 1859.

B. J. COLVIN, Esq., Judge, and C. B. TREVOR and G. LOCH, Esqs.,
Officiating Judges.

Case No. 288 of 1858.

*Special Appeal from the decision of Mr. W. S. Seton-Karr,
Officiating Judge of Jessore, dated 18th November 1857,
amending a decree of Adeebooddeen Mahomed, Moonsiff of
Comarcolly, dated 8th May 1857.*

Greeschunder Sen Paramanick, (Oozurdar,) *Appellant,*

versus

Ramgopal Bhadoree and others, (Plaintiffs,) and others, (Defendants,)
Respondents.

*Baboo Kishenkishore Ghose and Mr. R. T. Allan, for Appellant.
Baboo Shumbhoonath Pundit, for Respondents.*

THIS case was admitted to special appeal on the 29th April 1858, under the following certificate recorded by Messrs. B. J. Colvin and A. Sconce.

Held, that when the pleas of a party, originally an objector, are considered in drawing up the issues, and evidence is produced by him in support of those pleas, the objector has accepted the character of a defendant, and has exercised all the privileges of one: he cannot, therefore, subsequent-

"This suit was instituted to recover possession of certain lands under a foreclosed mortgage, executed by the representatives of one Rajkishore Rae. The first court gave a modified order, but, on appeal, the judge has given a decree for the full share specified in the deed of conditional sale; and the ground of special appeal taken by petitioner is, that he being a third party, not a defendant in the suit, and being in possession of the share awarded by the judge over and above that awarded by the moonsiff, the judge has erred in giving an order to dispossess him from this share.

"It appears that the common ancestor was Ramkunt Rae, who left two sons, Rajchunder Rae and Rajkishore Rae, and that the

sons of the latter, not being in possession of their full share of the family property, instituted a suit for the establishment of their title to hold one-half of the estates, and judgment was eventually given in their favor. The fact of the decree, having been so made, is allowed by petitioner, grandson of Rajchunder Rae, but he contends that he has ever continued to hold a ten anna and five gunda share.

"We admit the special appeal to try whether, as the fact of Greeschunder's possession is assumed by the judge, judgment can legally be given for more than the five anna and fifteen gunda share possessed by the vendors."

JUDGMENT.

On reverting to the record, we find that special appellant was at first only an objector: his pleas were, however, included in the issues, and he filed evidence in support of the same. He, in fact, accepted the character of an original defendant, and exercised all the privileges appertaining to one. Under these circumstances we think that any formal objection, on the ground that he was not originally made a defendant, has been, by his own acts and acquiescence, cured; and that the plea on this head raised in special appeal before us is of no validity. The judge, we observe, has, on a consideration of the evidence before him, whether rightly or wrongly, in effect found that the objector was only in possession of his own share of eight annas, and that plaintiff, the mortgagee, was entitled to the other eight annas, of which, under a decree of court, the mortgagors were in possession. Under these circumstances we see no grounds for interfering in special appeal with the order passed by the judge, but reject the application, with costs.

ly, raise any formal objection grounded on his original position, which, by his own act and acquiescence, has been cured. The plea, therefore, raised in special appeal on this ground, is of no validity, and the special appeal is dismissed, with costs.

THE 26TH JANUARY 1859.

B. J. COLVIN, Esq., Judge, and C. B. TREVOR and G. LOCH, Esqs.,
Officiating Judges.

Cases Nos. 462 and 463 of 1858.

*Special Appeals from the decision of Baboo Nobinkishen Paulit,
Principal Sudder Ameen of Chittagong, dated 19th January 1858, reversing a decree of Moonshee Ameenooddeen, Moonsiff of Deang, dated 27th December 1856.*

Mudhooram Bhuttacharj, (Plaintiff,) Appellant,
versus

Daveechurn and others, (Defendants,) Respondents.

Baboo Kishensukha Mookerjee, for Appellant.

Baboo Taruknath Sein, for Ramhurry Surma and others, Respondents.

Both special appeals dismissed, the one because the facts upon which the pleas taken in special appeal were based were not established, and the other because the land in suit was within the land forming the subject of the former suit.

THESE cases were admitted to special appeal on the 27th July 1858, under the following certificate recorded by Messrs. C. B. Trevor and H. V. Bayley.

"It will be convenient, from the circumstances of these two cases, to consider them together.

"Plaintiff brought two suits before the moonsiff against defendants. In the one suit he prayed for partition and possession of his share of ancestral land; in the other for possession of a house within such ancestral land.

"The moonsiff decreed both these suits in plaintiff's favor.

"On appeal, the principal sudder ameen reversed the moonsiff's orders in both cases, and dismissed both of plaintiff's suits.

"As to the suit for the partition and possession of plaintiff's share of ancestral land, the principal sudder ameen held that, as the plaintiff and defendants held *ijmalee*, each according to what was his right, the plaintiff had all he wanted.

"As to the suit for the house, the principal sudder ameen held that, as it was situated within the same ancestral land, no separate suit could be brought by plaintiff for it.

"Plaintiff appeals specially, urging, as to the first suit, that plaintiff prayed for partition of his share, and for separate possession, and not for possession *ijmalee*, which is all that the principal sudder ameen has considered and awarded.

"The special appellant urges, as to the *second* suit, that he had a right to sue separately for the house as a separate item of property, although situated within the ancestral land.

"We admit the special appeals, to try whether the cases should not be remanded to the principal sudder ameen for re-trial, on the grounds urged by the special appellant."

JUDGMENT.

We find that petitioner's suit for ancestral land was in this wise. He stated that there were 6 kanees 12 gundas 3 cowries of ancestral land, confirmed lakhiraj, of which there being deducted two separate parcels of 1 kanee 4 gundas 2 cowries, and of 2 cowries respectively, there remained 5 kanees 8 gundas, of which petitioner sued for the separate possession of an 18-gunda share as his, alleging that the ancestral property had been held jointly by him with his co-sharers, that he had been dispossessed by them, that he therefore sued for its recovery and for its being divided off to him by lot. The answer denied joint occupancy and dispossession, and asserted that petitioner was in separate occupation of what had been divided seventy years previously ; and the principal sudder ameen has recorded his opinion, that both parties had, for a length of time previous to suit, been in separate possession of their shares, and that neither party had encroached upon the share of the other. He, therefore, dismissed the suit. We do not, consequently, find that the facts upon which the pleas taken in special appeal are based are established ; for it is not that the principal sudder ameen has acknowledged petitioner's right to a share, and refused partition of what he has considered to have been held in joint tenancy, but he has found defendants' averment of previous separation and of undisturbed possession of petitioner on his land to be proved.

In the suit for the house, the principal sudder ameen has recorded, that the land on which it was said to be, was included within the land which was the subject of the other suit. In this case he was right in holding that both claims should have been the subject of one suit.

We dismiss both special appeals, with costs.

THE 26TH JANUARY 1859.

H. T. RAIKES, Esq., Judge, and C. B. TREVOR and H. V. BAYLEY, Esqs., Officiating Judges.

Case No. 40 of 1858.

Special Appeal from the decision of Mr. P. Tayler, Judge of West Burdwan, dated 30th June 1857, affirming a decree of Pundit Gobindchunder Bidyaruttun, Principal Sudder Ameen of that district, dated 4th March 1857.

Brijkishore Singh, (Plaintiff,) Appellant,
versus

Guddadhur Banerjee and others, (Defendants,) Respondents.

Baboos Shumbhoonath Pundit and Kishensukha Mookerjee, for Appellant.

Baboos Kishenkishore Ghose and Jugdanund Mookerjee, for Respondents.

THIS case was admitted to special appeal on the 27th January 1858, under the following certificate recorded by Messrs. H. T. Raikes and J. H. Patton.

Held, that Section II. of Act XLI. of 1858 makes all documents of the nature therein specified, which were executed before its enactment, though informal as the law stood at the time of their execution, *hereafter admissible in any court*; that Section III. of the same law enacts that, in cases in which documents of the same nature have been before the courts, and rejected on the ground that they were insufficiently stamped, a review of judgment may be had if the application be made within six months from the passing of the Act, and if the court to which the application is made be satisfied that the deed, if

"Petitioner questions the ruling of the courts below, dismissing his claim on the ground of non-compliance with the stamp law under the precedents of this Court of the 8th December 1853, 22nd November 1854, and 2nd July 1856.

"Petitioner stated in his plaint, that the deed in question required to be engrossed on a stamp of rs. 12, and a stamp of that value not being procurable, it was engrossed on two pieces of stamp, one of rs. 8 and the other of rs. 4 value; that in consequence of the names of the attesting witnesses being written on the sheet of rs. 4 value, the lower courts, under the precedents cited, have rejected his claim.

"He pleads that a similar case came before the Court by petition, and that a special appeal was admitted on the 10th July last by one of the presiding judges; and he prays that, as that case is still pending, involving precisely the same point now urged by him in special appeal, this appeal may be admitted and decided simultaneously therewith.

"We find that two cases, Nos. 511 and 512 of 1857, were admitted on the 10th July, to try whether a deed inscribed upon several sheets of stamp paper, to make up the requisite amount, and having the names of the attesting witnesses written on one of the sheets only, which was not in itself of the requisite value, constitutes a breach of the stamp laws, or not; and as this case involves the same question, we think it advisable to admit it for decision at the same time, and direct that the cases be brought up for hearing together."

JUDGMENT.

This special appeal was admitted to try whether the decisions of the lower courts are correct, which have both ruled that plaintiff's deed of sale is invalid, as under the stamp law it was required to be engrossed on a stamp of rs. 12, but was engrossed on two pieces of stamp paper, one of rs. 8 and the other rs. 4 value; and as the names of the witnesses were written on stamp paper only of the value of rs. 4, whereas the precedents of this Court, dated 8th December 1853 and 2nd July 1856, establish the principle that the signatures of the parties and the witnesses to a deed must be on a stamp paper of the full value required by law for the document.

It has been contended before us, that the effect of Section II. Act XLI. of 1858, which Act is retrospective, is such as to make all the deeds of the nature specified in it good and valid; that, consequently, the deeds in the case before us have been all along good and valid, and the decisions of the courts, refusing to look at them on account of their invalidity, should be rectified by this Court in special appeal, and that the special remedy provided by Section III. refers only to cases to which no appeal, regular or special, is any longer open.

Subsequently to the admission of this special appeal before us, Act XLI. of 1858 has been passed by the Legislature. By Section II. of this law, it is enacted that "every deed, instrument, or document, specified in Schedule A. annexed to Regulation X. of 1829, which is, or shall be, contained in more than one sheet or piece of paper, or other material, *shall be deemed to be sufficiently stamped, if any one or more of such sheets or pieces of paper, or other material, shall bear the requisite stamp or stamps equal in value to the required stamp, whether the signatures or seals of the parties and witnesses shall or shall not be upon such sheet or sheets;*" and this provision is to apply to deeds, instruments, and documents *executed before the Act passed*, as well as to those which may hereafter be executed.

It appears, then, that this section of the law makes all documents executed before its enactment, though informal as the law stood at the time of their execution, *hereafter admissible in any court*. Regarding documents of this nature *which have been before the courts*, and rejected by them on the ground that they were not properly stamped, by Section III. it is enacted that any party injured by the decision *may* obtain a review of judgment, if the application be made within six months from the passing of this Act, and if the court to which the application is made be satisfied that the deed, instrument, or document, if admitted, would have led to a different decision on the merits of the case; and by Section IV. the operation of Section III. is limited to six years from the date of the final decision by the court, which might have or had, as the case may be, looked into the merits of the case.

admitted, would have led to a different decision on the merits of the case; and that Section IV. of the Act limits the operation of Section III. to six years, from the date of final decision of the court, which might have looked, or did look, as the case may be, into the merits of the case.

Held, also, that Section II., as it stands, in no way declares that deeds of the nature alluded to in the Act *have been* valid, so that judgments correctly passed before the passing of the Act, grounded on their invalidity, are liable to reversal in special appeal.

Held, moreover, that as the decisions passed by the lower courts were correct, those decisions must be upheld in special appeal, and the special appeal must be dismissed, with costs; and it will remain for special appellant to make application to the highest court, which had power to enquire into the merits of his suit, for review of judgment, and the court, in granting or refusing the application, will be governed by the terms of Section III. of the law above cited.

Section III., it will be observed, gives a special remedy for a special state of things. The decisions passed were legal at the period at which they were delivered. This section, then, does not give any party a *right* to a review of those decisions, but it enables the courts, which of course, if the matter had been appealed, will always be the appellate court, to review the judgments passed, *provided they are satisfied that the admission of the deed would have led to a different decision* on the merits ; and then, only to this extent the remedy goes, but no further.

Doubtless the wording of Section II. might have been such as to have carried the power contended for by the pleader of special appellant ; but, as the section stands, it no way declares that these deeds have been valid, so that judgments passed before the passing of the Act, founded on their invalidity, are liable to reversal in special appeal. It impliedly accepts the law as laid down by this Court as correct, and then only enacts that these documents, heretofore inadmissible, shall hereafter be admissible, though executed previous to the passing of the Act, and then it provides a special remedy for cases which have already been before the courts, and in which documents of the nature alluded to have been rejected for informality.

In cases now pending in regular appeals no difficulty will be experienced. The appellate courts having the power to accept these documents, can remand the cases to the lower courts, in order that they may re-investigate the cases, looking to that evidence, which they legally, when first the case was before them, refused to accept.

We think, therefore, under this view of the law, that this Court in special appeal can only enquire, in accordance with its general practice, whether the decisions passed by the lower courts were, at the time they were passed, legal decisions. We have no doubt that they were so ; and, in short, looking to the current of decisions, we think that not the slightest legal ground existed for admitting the special appeals, which, in fact, were only admitted under the impression that a law, then before Council, if passed, might have retrospective effect. Act XLI. of 1858, which impliedly recognises the correctness of the Court's various decisions, does not alone bind our judgment, but the current of decisions of this Court above alluded to undoubtedly does. We therefore reject the special appeal, with costs ; and it remains for the special appellant to make application to the highest court, having power to enquire into the merits, before which his suit has been, for a review of its judgment, which, in granting or refusing the application, will be governed by the terms of Section III. of the law above cited.

THE 26TH JANUARY 1859.

B. J. COLVIN, Esq., Judge, and C. B. TREVOR and G. LOCH, Esqs.,
Officiating Judges.

Case No. 310 of 1858.

Special Appeal from the decision of Baboo Kassissur Mitter, Principal Sudder Ameen of Hooghly, dated 9th December 1857, reversing a decree of Baboo Gopeenath Moitra, Moonsiff of Rajapore, dated 2nd February 1857.

Sheikh Abdoollah, (Plaintiff,) *Appellant,*
versus

Mahytee Beebee, (Defendant,) *Respondent.*

Baboo Unookoolchunder Mookerjee, for Appellant.
Moulvee Aftaboodeen Mahomed, for Respondent.

THIS case was admitted to special appeal on the 8th May 1858, under the following certificate recorded by Messrs. H. T. Raikes and J. H. Patton.

"The petitioner sued for wasilat between 1247 and 1256 B. S., and gained a decree in the first court. The lower appellate court reversed that decree, on the ground that plaintiff, petitioner, had first sued for possession of the lands with which these profits were connected, and had instituted that suit when the Court's circular of the 11th January 1839 was in force; consequently, although the present action would be one maintainable under the more recent circular of the 15th June 1849, yet the plaintiff must be held, under the tenor of the old circular, to have relinquished his claim to profits, and cannot now sue for them.

"The special appeal is that, as the circular of the 15th June 1849 has removed all bar to separate actions for wasilat, the present suit should be tried on its merits, without reference to the promulgation of a different principle at the time when the other action was commenced.

"We admit the special appeal, to try whether plaintiff's failure to sue for wasilat, when claiming possession of the land, can be held to debar him from maintaining an action on that account, subsequent to the cancelment of the circular order of the 11th January 1839."

Held, that a person, when bringing his suit, must act up to the law of procedure then in force, and no subsequent rescission of the previous practice can give a plaintiff power to revive a claim, which, under the practice in force when the suit was originally instituted, as it was not included in the plaintiff, must be considered to have been relinquished.

The decision of the lower court confirmed, and the special appeal dismissed, with costs.

JUDGMENT.

It appears that plaintiff first, in 1842, sued Mulliah Beebee and others, and Shibram Dass, together, the former for possession of certain lands, the latter for rent due as an occupying ryot. The court, considering that there had been a misjoinder of claims and parties, nonsuited the plaintiff, and directed him to bring separate suits against the parties, defendants in that case.

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Plaintiff then, in 1848, sued Mulliah Beebee for possession alone, and obtained a decree in January 1848. He then, in July 1850, brought a separate suit against her for wasilat from 1842 to 1848. This claim the lower appellate court has disallowed, inasmuch as the suit for possession was brought in 1848, when the circular of the 11th January 1839 was in force; and as plaintiff did not include mesne profits in his claim, he must be considered to have relinquished them altogether.

A special appeal has been admitted to try whether, in consequence of the repeal of the circular of the 11th January 1839, by a subsequent circular, dated the 15th June 1849, the present suit, brought subsequent to the date of the first circular, is maintainable or not.

We think that plaintiff, when bringing his suit in 1848, was bound to act up to the law of procedure then in force, which was contained in the by-law or circular order of the Court, dated the 11th January 1839; that, consequently, not then having sued for mesne profits, he must, under that circular, be presumed to have relinquished his claim to them; and having once relinquished his claim, no subsequent circular, reversing the previous rule of practice in force, can revive that claim. Moreover, the circular of 1849 limits its operations prospectively. Under this view the decision of the principal sudder ameen seems to us to be quite correct, and we dismiss the special appeal, with costs.

THE 27TH JANUARY 1859.

H. T. RAIKES, ESQ., Judge, and H. V. BAYLEY, ESQ., Officiating Judge.

Petition No. 951 of 1858.

Application for Special Appeal from the decision of Baboo Oopen-durchunder Nyaruttun, Principal Sudder Ameen of Jessore, dated 26th March 1858, reversing a decree of Moonshee Ghulam Abed, Moonsiff of Jhenidah, dated 23rd July 1857, in the case of

Purresmonee Dasse, Plaintiff,

versus

Fuqueer Mahomed Biswas and others, Defendants.

Baboo Hurkallee Ghose, for Petitioner.

Moulvee Aftabodeen Mahomed, for the Opposite Party.

Case remanded, the decree relied upon to support a deed pleaded not being in a case between the parties in this suit.

IT is hereby certified that the said application is granted on the following grounds.

The petitioner was plaintiff. She sued for possession as for a purchased jote jumma. The defendants pleaded that the land was not a jote jumma, but a khanabaree, exempt from rent, and held so under a pottah adjoined by him to support this plea.

The lower court has held that, although the oral testimony on defendants' part supported their plea of the tenure being a *khanabaree* one, still the *pottah* on which they purported to hold was not proved; and that in a suit between a farmer and the defendants for rent, the farmer withdrew his claim on its being shown that the land was *khanabaree*. He, therefore, dismissed the plaintiff's claim.

The plaintiff appeals specially, urging, 1st, that as the *pottah* on which defendant rested his right to hold as *khanabaree* was not proved, the principal *sudder ameen's* judgment was defective; and, 2nd, that it was so also, as neither she, the plaintiff, nor the *zemin-dar*, was a party to the suit of the farmer, and the decree in it was never filed.

The opposite party relies on the principal *sudder ameen's* having gone on the general merits of the case, and that thus there is no ground for special appeal.

On a perusal of the decision of the principal *sudder ameen*, we consider his judgment substantially defective on the grounds urged by special appellant, and, consequently, that the case is open to special appeal, and we remand it that it may be re-tried with reference to these remarks, *i. e.* on the basis of the deed adduced by defendant, and with reference to the objection of the special appellant to the suit between the farmer and defendant not being binding on her.

THE 27TH JANUARY 1859.

B. J. COLVIN, Esq., Judge, and C. B. TREVOR and G. LOCH, Esqs.,
Officiating Judges.

Case No. 468 of 1858.

Special Appeal from the decision of Mr. J. J. Ward, Judge of Cuttack, dated 17th December 1857, reversing a decree of Baboo Tarrakanth Bidyasagur, Principal Sudder Ameen of that district, dated 21st August 1857.

Mohunt Deb Raj Dass, (Plaintiff,) Appellant,
versus

Mohunt Salgram Dass, (Defendant,) Respondent.

Baboos Unnodapersad Banerjee and Obhoychurn Bose, for Appellant, *Ex-parte*.

THIS case was admitted to special appeal on the 28th July 1858, under the following certificate recorded by Messrs. C. B. Trevor and H. V. Bayley.

"Plaintiff sued defendant for rent. Defendant urged that the rents for which plaintiff sued were set apart as the *bhog* (assignment) of the idol, Nursingh Thakoor, under a deed of gift from plaintiff's

Held, that a suit for declaration of title to rents, and for rent against the same party, does not subject plaintiff to be nonsuited.

ancestor, dated the 2nd March 1833. The moonsiff in that case held that, as the question of proprietary right was involved in the suit brought by plaintiff as for rent, he could not try it as one of rent only, and he nonsuited plaintiff. Plaintiff then sued for a declaration of the title to the rents and for rent.

"The principal sudder ameen decreed both these claims of plaintiff on the merits.

"On appeal, the judge held that the claim was two-fold, for possession as well as for rent, and nonsuited plaintiff on that ground.

"Plaintiff appeals specially, urging that the suit was properly brought for a declaration of title to rent and for rent, and, further, that where the principal sudder ameen had overruled the technical point of multifariousness, and had decided the case on the merits, Act IX. of 1854 should have been applied by the judge; and he should not have nonsuited the case.

"We are of opinion that, although the plaintiff's cause might perhaps have been more regularly brought, if a first suit had been instituted for a declaration of title to rent, and a second for the rent under the title so declared, still the judge might, under Act IX. of 1854, legitimately have proceeded to try the case on the merits.

"We admit the special appeal to try whether the case should not be remanded to the judge, to be tried upon the merits with reference to the above remarks."

JUDGMENT.

It appears that this suit was brought by Deb Raj Dass *versus* Salgram Dass, both for declaration of right and for rent in consequence of the asserted right. Here there was only one party upon whom the claim was made, and, therefore, he could not be prejudiced in his defence by having the so-called two-fold claim preferred against him, for it rested on the same basis of adverse title to plaintiff; but even if it were otherwise, there was no reason for an order of nonsuit *in toto*, as a judgment might have been passed with respect to either one or other portion of the claim. We, therefore, remand the case for the judge to dispose of the appeal on the merits.

THE 27th JANUARY 1859.

B. J. COLVIN, Esq., Judge, and C. B. TREVOR and G. LOCH, Esqs.,
Officiating Judges.

Case No. 470 of 1858.

Special Appeal from the decision of Syed Ahmud Buksh Khan, Principal Sudder Ameen of Mymensing, dated 15th January 1858, reversing a decree of Baboo Bhyrubchunder Mitter, Moonsiff of Madargunge, dated 30th May 1857.

Goursoonder Roy, (one of the Defendants,) *Appellant,*
versus

Kallachund Dutt and others, (Plaintiffs,) *Respondents.*

Baboo Unookoolchunder Mookerjee, for Appellant, Ex-parte.

THIS case was admitted to special appeal on the 29th July 1858, under the following certificate recorded by Messrs. C. B. Trevor and H. V. Bayley.

"It appears that, in this case, the moonsiff dismissed plaintiffs' suit without thinking it necessary to go at all into defendants' case.

"On appeal, the principal sudder ameen decreed plaintiffs' case, recording at the same time that the testimony of defendants' witnesses was not reliable without documentary evidence, *duleel binna*.

"The defendant appeals specially, urging, 1st, that, as the moonsiff had not gone into his case, there should be an order for remand, with a view to his being heard in both courts; 2nd, that the principal sudder ameen was wrong in stating that he had filed no documentary evidence, as he had filed three kuboolyuts, a roobakaree of the collector, and a bill of sale.

"On the *first* point we consider the objection untenable, as the moonsiff could not have done otherwise than he has.

"On the *second* point we admit the special appeal, to try whether the case should not be remanded to the principal sudder ameen, with instructions for him to consider and record his opinion upon the documents specified in the second plea, which documents the exhibit, read to the Court by the pleaders, records to have been filed."

JUDGMENT.

On turning to the record, we find that the defendant filed five documents, with a view of proving his pleas, but they were not looked at by the principal sudder ameen: we consider, under these circumstances, his decision defective. We, therefore, remit the case to him, in order that he may re-investigate the case, looking to the entirety of the evidence produced by the defendant, as well as that filed by the plaintiffs, and pass whatever order may eventually seem just and proper.

Case remanded, in order that the principal sudder ameen may re-investigate the case, looking to the entirety of the evidence produced by the defendant, as well as that filed by the plaintiff, which he has not done, and pass whatever order may eventually seem just and proper.

THE 27TH JANUARY 1859.

B. J. COLVIN, Esq., Judge, and C. B. TREVOR and G. LOCH, Esqs.,
Officiating Judges.

Case No. 421 of 1858.

*Special Appeal from the decision of Moulvee Ameeroodeen Mahomed, Additional Principal Sudder Ameen of Chittagong, dated 18th November 1857, affirming a decree of Moulvee Abdool Futteh Caze, Sudder Moonsiff of that district, dated 19th June 1856.*Khoondkar Abdoollah, (Plaintiff,) Appellant,
versus

Burhan Kulal, and the Collector, (Defendants,) Respondents.

*Moulvee Aftaboodeen Mahomed, for Appellant.**Baboo Ramapersad Roy, for the Collector, Respondent.*

Plaintiff sued for possession of 8g. 3k., and for the correction of chittas regarding 2 kanees, by which they, instead of being entered as a portion of his talook Hureerampore, have been made to form a portion of Ram Dass, though settled with him by the zemindar of turuf Joynarain Ghosal as a portion of Hureerampore.

The defendant pleaded, that the land in dispute was a portion of talook Ram Dass, and that it was settled with him as such by the collector, when the estate of Joynarain Ghosal was under the Court of Wards.

The principal sudder ameen dismissed the case, inasmuch as the collector, having settled the land as a

THIS case was admitted to special appeal on the 6th July 1858, under the following certificate recorded by Messrs. C. B. Trevor and H. V. Bayley.

“ Plaintiff in his plaint sued for settlement of 2 kanees 8 gundas 3 krants of land, alleging that the settlement of them had been wrongly made as part of talook Ram Dass, while, in reality, they belonged to talook Hureerampore. In his replication, plaintiff gave up his claim to 2k., and asked to be put in possession of the remaining 8g.-3k., from which he alleged the defendant Burhan Kulal had ousted him. The moonsiff held that plaintiff had not proved his alleged possession, that the collector had made the settlement with talook Ram Dass, and that, after that, that settlement could not be interfered with. The moonsiff, accordingly, dismissed plaintiff's claim. Plaintiff appealed to the principal sudder ameen, who held that, as plaintiff had, in his plaint, sued for settlement of 2k.-8g.-3k., and, in his replication, for possession of 8g.-3k., his claim could not be admitted on account of this variance.

“ The plaintiff urges in this special appeal, that the principal sudder ameen should not have dismissed his appeal on the above ground, for that he (plaintiff) merely gave up 2k. of his claim by his replication, and that it was the duty of the principal sudder ameen to adjudicate the right to the remaining 8g.-3k. on the proofs which the record might contain.

“ It appears from the moonsiff's decision, that both parties admit the land in dispute to appertain to turuf Joynarain Ghosal; and when that turuf was under charge of the revenue authorities in the Court of Wards, they made a settlement of the land now in suit with Ram Dass's talook; but that when the turuf was restored to the proprietors, they made the settlement with the plaintiff.

" We admit the special appeal, to try whether the principal sudder ameen was right in dismissing the appeal, upon the ground of the variance in the plaint and replication, or whether he should not have investigated the correctness of the decision of the moonsiff upon the merits of the case, and upon the proofs on the record."

JUDGMENT.

On reverting to the record, we find that plaintiff sues for possession of 8g.-3k., and for the correction of the chitta regarding 2k., by which they, instead of being entered as a portion of his talook Hureerampore, have been made to form a portion of Ram Dass, though settled with him by the zemindar of turuf Joynarain Ghosal as a portion of Hureerampore.

The defendant pleads that the land in dispute is a portion of his talook Ram Dass, and that it was settled with him as such by the collector when the estate of Joynarain Ghosal was under the Court of Wards.

The principal sudder ameen dismissed plaintiff's case, inasmuch as, the collector having settled the land as a portion of turuf Ram Dass, the fact cannot now be questioned.

We think that the decision of the principal sudder ameen of Chittagong, in its present form, cannot stand, but that it is incumbent on him to enquire whether plaintiff is of right entitled to the land as sued for by him, as the mere act of the collector, acting as agent of the Court of Wards, cannot alone be decisive of the relative rights of the parties in this suit. We, therefore, remit the case to the principal sudder ameen, with directions that he re-investigate the case, irrespective of the act of the collector, and looking to the evidence of right, both documentary and oral, that both parties may place before him.

portion of turuf Ram Dass, the fact cannot now be questioned.

Held, that it was incumbent on the principal sudder ameen to enquire whether plaintiff is of right entitled to the land as sued for by him, as the mere act of the collector, acting as agent of the Court of Wards, could not alone be decisive of the relative rights of the parties to the suit.

Case remitted to the principal sudder ameen, with directions that he re-investigate the case irrespective of the act of the collector, and looking only to the evidence of right, both documentary and oral, filed by both parties.

THE 27TH JANUARY 1859.

B. J. COLVIN, ESQ., Judge, and C. B. TREVOR and G. LOCH, ESQS.,
Officiating Judges.

Case No. 471 of 1858.

*Special Appeal from the decision of Mr. E. DaCosta, Principal
Sudder Ameen of Tirhoot, dated 7th January 1858, affirm-
ing a decree of Moulvee Syud Anwar Ali, Moonsiff of Julla,
dated 3rd January 1857.*

Kashee Thakoor, (Defendant,) *Appellant,*
versus

Baboo Lall Jha, (Plaintiff,) and Khedun Lall and others, (Defendants,)
Respondents.

Baboo Gopal Lall Mitter, for Appellant.

Baboo Unnodapersad Banerjee, for Respondents.

Special appeal dismissed, as, on reference to the record, it was found that the special appellant had, in the lower court, brought forward no evidence to sustain the allegation on which the special appeal had been admitted.

THIS case was admitted to special appeal on the 29th July 1858, under the following certificate recorded by Messrs. C. B. Trevor and H. V. Bayley.

"The plaintiff sued defendant for money alleged to have been deposited with him, and for which an amanutnamah had been given by defendant to plaintiff.

"The defendant denied receipt of any such money, and the execution of any such amanutnamah.

"The moonsiff decreed plaintiff's suit.

"The defendant appealed, denying, in his grounds of appeal, that any part of the plaintiff's allegations was true.

"The principal sudder ameen held, that the pleas urged in appeal were contained in the following issues: 1. Is the amanutnamah on adequate stamp? 2. Has the amanutnamah in question been proved?

"The principal sudder ameen held that the first plea must be overruled under Act IX. of 1854, and that the amanutnamah was proved. He entered into no other matter, and upheld the moonsiff's decision.

"The defendant urges, in special appeal, that the principal sudder ameen should have investigated the matter of the receipt of the money, which defendant had distinctly denied, and should have required proof from defendant on that point.

"We admit the special appeal, to try whether the judgment of the principal sudder ameen is not defective in this respect, and whether the case should not be remanded accordingly."

JUDGMENT.

We think it unnecessary to remand this case; for, though the principal sudder ameen has pronounced no opinion on the plea advanced

by the defendant, that he did not receive any money in deposit, yet, on reference to the record, we find that the defendant has brought forward no sufficient proof in support of his plea. The appeal is dismissed, with costs.

THE 27TH JANUARY 1859.

B. J. COLVIN, Esq., Judge, and C. B. TREVOR and G. LOCH, Esqs.,
Officiating Judges.

Special Appeals from the decision of Mr. E. Lautour, Officiating Judge of 24 Pergunnahs, dated 27th February 1857, reversing a decree of Sheikh Mohummud Saem Khan, Principal Sudder Ameen of that district, dated 27th May 1853.

Case No. 866 of 1857.

Hurrishchunder Roy Chowdree, (Plaintiff,) *Appellant,*
versus

Poornee Beebee and others, (Defendants,) *Respondents.*

Baboos Ramapersad Roy and Kishenkishore Ghose, for Appellant.

Baboos Unookoolchunder Mookerjee and Shumbhoonath Pundit, for Respondents.

Case No. 867 of 1857.

Idem in the case of

Hurromohun Banerjee, (Plaintiff,) *Appellant,*
versus

Musst. Poornee Beebee and others, (Defendants,) *Respondents.*

THIS case (No. 866) was admitted to special appeal on the 13th November 1857, under the following certificate recorded by Messrs. A. Sconce and J. S. Torrens.

"The decision of the judge will be found at page 56 of the printed Decisions of the month. The suit was by a co-sharer in a mehal, to recover the sums paid on account of revenue of the defendants, co-sharers. The payment of the revenue for the shares of the defendants is admitted, but it is pleaded that plaintiff keeps the defendants out of possession, and, therefore, they cannot be held liable.

"Plaintiff denies that he has kept defendants out of possession, and the special appeal is preferred against the judge's decision, which has found that defendants cannot be held liable by reason of the dis-possession, on two grounds :

1. That there is no legal proof of plaintiff's having kept defendants from possession.

2. That when payment of the defendants' share of revenue is admitted, an allegation of dispossession, which they might have

Plaintiff sued to recover from defendants, his co-sharers, revenue paid on their account. The judge held that defendants were not only out of possession, but kept out of possession by plaintiff. Special appeals accordingly dismissed.

remedied by law, cannot set aside plaintiff's right to recover the money paid.

"We admit the special appeal to try the above points.

"This certificate applies also to case No. 867 of 1857."

JUDGMENT.

On reference to the decision of the judge, we do not find that the first plea, that there is no legal proof of plaintiff's having kept defendants out of possession, can be sustained; for the judge has recorded unmistakably the grounds upon which he formed his judgment to such effect; and, as he found not only that defendants were out of possession, but that they had been kept out of possession by the opposition of plaintiff, we consider that the second plea is equally invalid, for plaintiff does not come into court with clean hands, but as a wrong-doer, and is not entitled, therefore, to recover from defendants what he, under the aforesaid circumstances, may have paid as revenue on defendants' account. It is argued for special appellant, plaintiff, that defendants may sue for possession and wasilat, but should now pay him the revenue which plaintiff paid for him. This, under the circumstances, we do not consider defendants liable for in this suit, although, should defendants sue for possession and wasilat, what plaintiff now claims may be regarded as a set-off in account. We reject both appeals, with costs.

THE 31ST JANUARY 1859.

H. T. RAIKES and A. SCONCE, ESQS., Judges, and H. V. BAYLEY, ESQ.,
Officiating Judge.

Case No. 327 of 1857.

Regular Appeal from the decision of Moulvee Abdool Azeez Khan, Principal Sudder Ameen of Purneah, dated 21st February 1857.

Syud Ahmed Reza and others, (Defendants,) *Appellants,*
versus

Rajah Enayet Hossein, (Plaintiff) *Respondent.*

Baboo Ramapersad Roy and Shumbhoonath Pundit, for Appellants.

Baboo Kishenkishore Ghose and Moonsee Ameer Ali, for Respondent.

Messrs. H. T. Raikes and H. V. Bayley.—Plaintiff sued in this case, on the 25th January 1856, for the recovery of rs. 23,311-14-10, and for the reversal of certain miscellaneous orders of the zillah courts.

Plaintiff A alleged that he paid the arrears of revenue due on a joint estate, and thus saved it from sale. He then sued for the recovery of

Plaintiff stated his case thus. The zemindaree of Soorajpore was, till 1253 M., managed by surburakars appointed by the collector.

Towards the close of that year, it was equally divided between plaintiff, the son of Rajah Deedar Hossein, on the one part, and Ahmed Reza and Mahomed Reza, sons of Hossein Reza, and Enayet Reza *alias* Meerun, on the other. This Enayet Reza married Ameeroonissa *alias* Binka, the daughter of Akbar Hossein, this last-named being the brother of Deedar Hossein and of Hossein Reza. By a decree of this Court of the 12th June 1847, page 224, Meheroonissa, daughter of Zeenutoonissa *alias* Hinga, the daughter of Akbar Hossein, was declared entitled to a 2a-4g. share of the moiety of the Soorajpore estate. She is stated never to have been recorded in the collectorate as holding this share, and not to have got possession of it, but that it was held by defendants, Ahmed and Mahomed Reza, who collected the rents, but failed to pay the revenue. The estate, accordingly, fell into arrears, and, being a joint one, the whole was advertised for sale, when plaintiff paid the arrears from his own means, and saved it from sale. He then sued for the recovery of his money, and got a decree on the 23rd May 1848, jointly and severally, against Ahmed and Mahomed Reza, Enayet Reza *alias* Meerun, and Meheroonissa, for rs. 35,003-10-3. This decree provided that Meheroonissa was not to be liable in her person, as she had not held any possession of the property, but her debt under the decree was to be realised from her malikana for the year 1254 M. On execution of this decree no malikana was found belonging to Meheroonissa in deposit in the collectorate. Intermediately, Ahmed Reza and Mahomed Reza petitioned that their judgment debt to plaintiff might be paid from the sum decreed in their favor against plaintiff for costs, in a case decided in Her Majesty's Privy Council. The judge, in his proceedings of the 19th August 1848, in the

to A on his decree on account of E's share. A, alleging that B and C had possession of E's share, sued them for the sum so apportioned.

B and C pleaded that the whole case had been disposed of by the judge's order, adjusting A's decree against them by crediting A with the sum of their decree against him, and that A's remedy was by appeal from that order, or by revival of execution, and that this suit would not lie; and, further, they had never held E's share.

The principal sudder ameen held that B and C did hold E's share; that they were responsible to A for the amount apportioned by the judge as for E's share; and that the accounts showed that A (plaintiff) had collected less than his co-sharers.

B and C appealed, urging that A (plaintiff) should have revived execution, or appealed from the judge's order of separate apportionment on account of E's share; that plaintiff's alleged advance was a personal debt separately due by those for whose respective interests it was made; that the apportionment referred only to the malikana of one year, and not to the share in the estate now sued for; and that appellants never held E's share or more than their own.

Held by a majority that the original decree being a joint and several one, the acquittance pleaded by B and C could only affect their original shares, and not be a general release, and that acquittance was only the result of the particular mode of adjustment sought by B and C themselves.

Held, also, that the plaintiff was not wrong in suing as he has, instead of proceeding by revival of execution or appeal from the order of apportionment, because it was the court itself which indicated, by such order, the manner of proceeding, and wrongly made that apportionment, when the decree was clearly one against B, C, D, and E, jointly and severally, with a reservation only as to E's person, and thus plaintiff could sue for what remained unsatisfied of his decree.

Appeal dismissed.

miscellaneous department, apportioned rs. 14,626-14-10, as on account of Meheroonissa's 2a.-4g. share, and as one unconnected with the Privy Council decree ; he then set off the amount due to Ahmed and Mahomed Reza for costs in that decree, and declared that after that rs. 2384-1-1 were due by plaintiff to Ahmed and Mahomed Reza. This was duly paid. Plaintiff then petitioned to have the sum of rs. 14,626-11 (apportioned, as above, on account of Meheroonissa's share) paid to him, and, such share being in the hands of Ahmed and Mahomed Reza, he took out attachment against it. Execution in this mode was refused by the judge. Plaintiff then sued Ahmed and Mahomed Reza regularly for a principal sum of rs. 14,626-14-10, with interest rs. 8685, or a total of rs. 23,321-14-10, praying that it might be realised by the sale of the shares of the zemindaree held by them, including, as amongst these, Meheroonissa's share.

Meheroonissa was not originally made a defendant, but was so by a supplemental plaint.

Defendant, Ahmed Reza, pleaded to this suit, that he had, on the 4th June 1853, received a full acquittance on account of the plaintiff's claim under the joint decree, and that the execution case of that decree had been struck off accordingly ; that, if plaintiff had been dissatisfied with the judge's order of the 19th August 1848, he should have appealed against it, which he did not ; that there was, subsequent to that, litigation with the plaintiff, as to the interest, during which plaintiff never mooted his present claim ; and that the whole litigation was definitely closed by the order of this Court, of the 28th August 1852, and the execution case then finally struck off ; and that thus no such new suit as this can now lie against the defendant, as for the sum apportioned to Meheroonissa's share. It is added in the answer, that Meerun, on the 1st August 1846, obtained from this Court an order to be put in possession of 2a.-4g., and that Meerun, in plaintiff's name, collected all the rents of 1254 M., and had thus received far more than his share of the profits, but had, notwithstanding, under pretext of having paid arrears to save the property from sale, brought this action.

The answer of Enayet Reza *alias* Meerun is to the same effect. He also pleads that he got a decree for 2a.-4g. of the property, but never got possession, nor had any concern with it.

Defendant, Afzulnissa, who is sued as purchaser of Meheroonissa's share, denies that purchase, and alleges that she purchased 11g. of Meerun's share, and that plaintiff had never paid any revenue on her account.

The principal sudder ameen held that defendants, Ahmed Reza and Mahomed Reza, were responsible to plaintiff on account of Meheroonissa's share for 1254, as holding that share themselves. He held also that the acquittance pleaded against plaintiff did not cover that share,

but only the original shares of defendants, Ahmed and Mahomed Reza. The principal sudder ameen considered that the question of, whether plaintiff had made collections on account of Meheroonissa and Meerun, in respect to the moiety of Soorajpore, could not be tried in this suit, but that the accounts filed showed that plaintiff had collected less than defendants. He decreed that rs 11,021-7-8, on account of Meheroonissa, under plaintiff's original decree, should be awarded to plaintiff, and realised from Ahmed, Mahomed, and Enayet Reza, by the sale of their zemindaree rights, and he released Afzulnissa altogether from plaintiff's claim.

Defendants Ahmed and Mahomed Reza have now appealed to this Court from that decision, and the following pleas have been urged upon us on their behalf:

1. That the judge's order of the 19th August 1848 gave full relief for the whole as against appellants personally, and also as for the property, jointly and severally, howsoever held; and that, if plaintiff considered any sum still due, his course was by revival of execution, and not by this suit, which could not lie.

2. That the alleged advance by plaintiff to save the property from sale for arrears of revenue on behalf and on account of the other sharers in it, was a *personal* debt of such sharers; and that the joint property could not be liable for it, or the advance be considered to give any lien on it.

3. That the plaintiff could have no claim against appellants for the 2a-4g. share of Meheroonissa, because the judge's order of the 19th August 1848 at most only referred to the malikana of one year, 1254 M.; and because, further, appellants' possession was one in their own right, and not by a succession to or transfer by Meheroonissa; and that the fact, that appellants all along had sole proprietary title, was shown by Meheroonissa's deed of relinquishment, which was not found to have been otherwise than in good faith.

4. That the appellants could not be held liable for plaintiff's claim, till it was proved that they had appropriated the whole of the profits of 1254 M., beyond what was, in fact, their own rightful share; but that the principal sudder ameen had not considered appellants' proofs on this point, but had relied on disputed and unproven accounts, such as those of the amil, Kasim Ali.

On the other hand, the respondent's pleader urged that, although the share of Meheroonissa was specifically sued for in the plaint, still it was so only as a component part of the estate in the hands of the appellants, against which the plaintiff's decree was given; further, that such specification in the plaint was only in consequence of the judge's order of the 19th August 1848, which apportioned the sums on account of shares in a particular way; that that order indi-

cated the separate items which formed the general property against which plaintiff's decree was to go ; and that it was not for plaintiff to do more than follow the course thus prescribed by the court. It was added that there was no necessity for appealing from that order, as it did not in any way ignore plaintiff's right under his decree against the estate of defendants, jointly and severally ; that Meheroonissa's share was found to be held by these appellants ; that the acquittance they pleaded referred to their own original shares only, and not to that acquired by them from Meheroonissa, which was equally liable for plaintiff's decree, and against which, as part of the general property, plaintiff's decree was in full force. The validity of Kasim Ali's accounts was urged by respondent, who alleged that Kasim acted for all parties ; and those accounts were relied on as showing defendants had collected Meheroonissa's share and their own, and more than they were entitled to as their share for either themselves or her.

JUDGMENT.

We will premise by stating our opinion that the question, whether the parties before us collected more or less than their respective shares, as shown by the accounts filed, is beyond what we have now to decide, which is, whether plaintiff has wrongly broken up his own decree, and wrongly sued these defendants specifically and separately for Meheroonissa's share ; whether the acquittance pleaded by defendants releases them from all further liability ; and, whether they, as holding Meheroonissa's share of the joint property against which the decree of plaintiff went, are responsible to plaintiff in this suit.

The decree which affords plaintiff the basis of his present claim, was one, clearly, jointly, and severally against Ahmed and Mahomed Reza, Meerun *alias* Enayet Reza, and Meheroonissa ; the only proviso being that, as the last-named had not been in possession, she should not be liable in person ; but, at the same time, the decree was distinct that her portion of the zemindaree receipts for 1254 M., on account of her 2a.-4g. share, might be available to satisfy plaintiff's claim. The scope of the decree being, in our opinion, this—does the acquittance, pleaded by appellants, release them from plaintiff's claim in this suit ? We do not think it does, for it is not, as alleged, a full release from *all* plaintiff's claim under his decree for money advanced for the general property, but only for those on account of defendants' *original* shares, irrespective of Meheroonissa's, or any other which, being liable under the general decree, should come into appellants' hands, or pass into those of others. The acquittance was a result of the method of adjustment sought by and made for the convenience of defendants themselves, by the set-off of the amount of their Privy

Council decree against plaintiff to their credit, for plaintiff's decree against them and others, jointly and severally. The character of the decree being that of a joint and several one, it clearly was contemplated by it that, if Meheroonissa's share of the receipts for 1254 were not forthcoming, the judgment debtor should be liable. In respect to the alleged defect of the plaint, as going solely and separately against Meheroonissa's share, and that as a distinct property, we have to remark that a perusal of the plaint as a whole does not lead us to conclude that its object was other than to show that, as Meheroonissa's share was in the hands of the appellants, jointly and severally liable, he sued them for it, as the parties responsible for the particular item of the original decree.

It has been much pressed on us, that revival of execution, and not this suit, afforded the only authorised manner for plaintiff to bring forward his claim. But it was not the plaintiff, who, after the decree against the sharers named jointly and severally, apportioned particular sums for particular shares, but the court itself, and that in a proceeding in execution of the decree. It is also much pressed on us that plaintiff should have appealed from this order, and, not having done so, cannot now be heard in this suit. In the first place, we consider that the plaintiff may fairly have thought that he was bound to proceed in the manner indicated by the court, in the order of the 19th August 1848; but, irrespective of this, that order was wrong in drawing a distinction between the liabilities of appellants and Meheroonissa, since the original decree, being joint and several, did not and could not authorise any such distinction, for, under such a decree, whether appellants held in their own, or in Meheroonissa's right, they were equally liable, and plaintiff was entitled to sue defendants on that liability, for whatever remained due under the decree to him.

For these reasons, we see no ground to interfere with the order of the court below, and dismiss the appeal, with costs.

Further Note by Mr. Raikes.—I quite concur with Mr. Bayley, in whose judgment the facts of this case have been detailed, as to the propriety of not interfering with the lower court's order in this case.

It seems to me impossible to come to any other conclusion than that the plaintiff is entitled to recover the balance of his decree from the defendants, Ahmed and Mahomed Reza, whether they appropriated to themselves the share of malikana receivable by Meheroonissa for 1254 or not. It is equally clear that the same defendants have, on every occasion, attempted to thwart and impede the plaintiff, in his several attempts to realise his money, either from themselves or from Meheroonissa's share of the proceeds, supposed by him to have reached their hands. The whole of this

litigation has, in fact, been promoted by them, and the erroneous orders of the lower court, arising from its own misconception of plaintiff's rights, are clearly traceable to the excuses and devices set up by the defendants, by which they have attempted to restrict plaintiff's right to realise his money from Meheroonissa alone ; while, at the same time, using every endeavor to appropriate to themselves whatever interests of Meheroonissa might have been made available to plaintiff in satisfaction of his decree.

Under such circumstances, I think the plaintiff was fully justified in bringing to issue all questions which had been raised by the subordinate courts in execution, and putting an end to the litigation by a regular suit. Had the defendants, when this suit was instituted, at once closed the controversy, by confessing what their own liabilities had been, instead of vexatiously disputing the just claim of the plaintiff, and seeking to mislead the court on the merits, they might have justly pleaded for relief from any costs this course of the plaintiff had entailed upon them ; but as their defence was calculated and intended to further impede the plaintiff in the pursuit of his rights, I hold them entitled to no consideration, and agree with Mr. Bayley in upholding the order of the lower court in all respects.

Mr. A. Sconce.—This suit is brought by plaintiff, respondent, proprietor of a half share of pergunnah Soorajpore, to give complete effect to a decree made in his favor on the 23rd May 1848, for an arrear of Government revenue of the year 1254, contributed by him on behalf of the proprietors of the second half of that pergunnah. The parties now before us are the same parties who were before the Court in 1848 ; but obstacles to the complete execution of that decree having been accepted by the zillah court, in which the process of execution was sued out, plaintiff has preferred the present claim with a view to overcome those obstacles.

Now the decree of 1848 was made against all the defendants jointly and severally ; but with respect to one of the defendants, Meheroonissa, it was declared that, as she was not in possession of the estate in 1254, execution against her should be taken only with respect to the amount of malikana that might represent her share ; meaning, apparently, that, as the estate had been managed in 1254 by an amil named Kasim Ali, plaintiff, the decree-holder, should follow up the realisation made by Kasim Ali on behalf of Meheroonissa.

Under such circumstances, it appears to me that, in so far as this suit is brought against the defendants, appellants, to reinforce their personal liability for the original debt, it will not lie. The decree of 1848 against them was complete, unconditional, absolute. By that decree plaintiff's right to recover the whole debt from these appellants

was definitely determined, and as against these appellants it was for the plaintiff to avail himself of all the processes in execution which the law allowed. It may be that the zillah judge, in execution, misinterpreting the terms of the decree, converted a joint debt into a separate debt, and erroneously apportioned Meheroonissa's share to be payable by her alone, and not by her co-defendants; but the proper course for plaintiff, I apprehend, was to appeal against that order; and, certainly, as I think, a second suit cannot lie to correct the zillah judge's erroneous interpretation of the first judgment.

With respect to the reservation made on account of Meheroonissa's malikana, the appellants accept that obligation so far as it can be shown to affect them. If the share of Meheroonissa's right can be shown to have been realised by them, they are willing that, to that extent, a decree should now pass against them; but they contend that the principal sudder ameen has not sought the determination of that issue by the reception of legal evidence. In this plea I concur. The principal sudder ameen accepts accounts imputed to the amil, Kasim Ali; but these accounts are not proved, nor is the result of Kasim Ali's management in any way explained or brought out by evidence. For the determination of this point, I would send back the record to the first court.

THE 31ST JANUARY 1859.

H. T. RAIKES and A. SCONCE, Esqs., Judges, and H. V. BAYLEY, Esq., Officiating Judge.

Case No. 156 of 1857.

Regular Appeal from the decision of Baboo Kassissur Mitter, Principal Sudder Ameen of Hooghly, dated 27th December 1856.

Joykishen Mookerjee, (Plaintiff,) *Appellant,*
versus

Musst. Bhagiruthee Dasse and others, (Defendants,) *Respondents.*
Baboo Ramapersad Roy and Kishenkishore Ghose, for Appellant.
Moonshee Ameer Ali and Baboo Obhoychurn Bose and Baney-madhuk Banerjee, for Respondents.

Suit laid at Company's Rupees 5773-12-5.

WE need not go into the very long and elaborate details which the pleaders for the appellant have most unnecessarily inflicted upon us for no apparent purpose. The plaintiff, who is also appellant, purchased the estate of Kamdebore from one Oomachurn Mookerjee, on 3rd Choitro 1256; the said Oomachurn having bought it from Ryekomul, the daughter of Bissumbhur Holdar,

Judgment of lower court upheld. The evidence went to show that A sold an estate to B, and gave B kubooyut of transfer, and then

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executed a koolyut as putnee lessor of a part of it in favor of C, and bestowed a portion of the putnee, by deed of gift, on his daughter. She sold her rights to D, and he to E. The daughter's possession at any time was not proved; while the transfer of sale was prior to the other transactions mentioned. B's rights and possession could not therefore be infringed.

who had bestowed it in gift upon the said daughter in 1240, on the occasion of the marriage. Plaintiff avers that a village named *Syah* constitutes one of the mouzahs of Kamdebpore, as shown by the registers and collectoree papers of the estate filed in the collector's office; that this village, and three others belonging to Kamdebpore, were taken by name, and, with several other villages of four more estates of Bissumbhur Holdar, were made into a putnee tenure, called Gopeenuggur, and granted to Ramkissen Holdar on 2nd Maugh 1221 B. S.; that of the villages thus united, Prankissen Holdar separated seven with a proportionate amount of jumma, and, on 1st Falgoun 1233, mortgaged the remaining twenty-four mouzahs to Pranmonee, the wife of Bissumbhur Holdar, who, in due course, foreclosed the mortgage, and took possession of the villages as a putnee tenure, at a jumma of sicca rs. 14,866; that among the villages thus held by Pranmonee was the village of *Syah*, which Pranmonee then let in durputnee to one Muthoormohun Mitter, and, on the durputnee being sold for arrears of rent, Bissumbhur Holdar purchased it in the name of his daughter, Ryekomul, and disposed of it by sale to Nubokissore Gossain, who now holds it in durputnee. Plaintiff avers that these changes have never constituted any separation of the village from the Kamdebpore estate, and that when Bissumbhur Holdar bestowed that estate, together with Lot Derroa, upon his daughter, Ryekomul, it included this village, and he continued to hold possession only as her agent, and accounted to her for the proceeds up to the date of his decease in 1251 B. S. It happened, however, in 1249, that Bissumbhur Holdar sold his estate of tuppah Burdeb to the Gossain defendants; and as some of the villages of this estate had been comprised in the putnee talook of Gopeenuggur, which came into the possession of Pranmonee by foreclosure of the mortgage given to her by Prankissen, the defendants became entitled to the putnee rent of such villages; and having colluded with Nubokissore Gossain, the durputneedar of mouza *Syah*, have assumed it to be one of the villages of tuppah Burdeb, and have prevented the proprietors of Kamdebpore from making collections therein, and dispossessed them. Plaintiff, therefore, on the averment, that this village constitutes a part, of his purchased estate of Kamdebpore, sues to recover possession.

The Gossain defendants, in the first place, deny that the deed of gift executed by Bissumbhur, in favor of his daughter, Ryekomul, was ever acted on during the life-time of Bissumbhur, or that Ryekomul ever had possession of Kamdebpore, either directly or indirectly, as alleged by the plaintiff. They admit the creation of the putnee, and that Pranmonee got possession of *Syah*, and gave it in durputnee, as stated by plaintiff; but they allege that when

Bissumbhur Holdar sold them the estate of tuppah Burdeb in 1249, the village of *Syah* was one of those sold to them, and that possession was delivered to them of that village with the rest, and that Bissumbhur Holdar, in the following year, executed a kuboolyut in their favor for such villages as were included in the putnee of Gopeenuggur, as appertaining to tuppah Burdeb ; and that among those villages named was the village of *Syah*, now in dispute, which, consequently, is thus shown by Bissumbhur's own act to have been included in their purchase ; and as Ryekomul was surety for Bissumbhur as their putnee lessor, and executed a security bond to that effect, she must have been aware of the disputed village having been passed to them, and have been a consenting party to the transfer.

The principal sudder ameen held, on the evidence adduced by the plaintiff, that there was no reliable proof of Ryekomul's possession in any shape during the life-time of her father, Bissumbhur ; that Bissumbhur had sold to the Gossains his estate of tuppah Burdeb, and had shortly afterwards executed a kuboolyut as putnee lessor of the villages under that estate comprised in the putnee of Gopeenuggur, at a rent of rs. 5921 ; and that Ryekomul, his daughter, had executed a security bond as surety for her father ; that as, under these circumstances, there was no doubt that Bissumbhur had, while in possession of both estates, conveyed the village in dispute to the defendants, they are entitled to hold it without question.

Exception is taken by the pleaders for appellant to the reliance placed by the lower court on the evidence adduced by the defendants. They have argued that, while no attention has been paid to the public documents submitted by the plaintiff, showing that the village of *Syah* was recorded as a village of Kamdebpor and not of tuppah Burdeb, and that when the putnee of Gopeenuggur was created, private records show that this village was taken by name with others of Kamdebpor to form the tenure, the lower court has readily believed the two witnesses cited to prove the kuboolyut of 27th Bysack 1250, said to have been executed by Bissumbhur, after the sale to defendants of tuppah Burdeb, and the security bond on the part of Ryekomul, although but one of those witnesses attested the deed, and both are of an inferior position in life, with arguments of a similar tendency, which did not affect the real merits of the case.

It is evident to us that, although Bissumbhur executed a deed of gift in 1240, bestowing upon his daughter, Ryekomul, the estates of Kamdebpor and Derroa, he continued to hold possession of them during his life-time, as is shown by his having mortgaged them as his own to Anundram at one time ; and although, it is alleged, that this possession was in reality as agent, and for the benefit of his

daughter, who succeeded thereto, without question, on his decease as donee, yet the transfer so made in her favor was without consideration, and did not take effect during the donor's life-time. As then, Bissumbhur, while so holding possession of Kamdebpore, did, as proprietor of tuppah Burdeb, sell to the defendants and convey to them that estate for good consideration, we have no hesitation in holding that, if Bissumbhur delivered over to the Gossains the village of Syah as a village of tuppah Burdeb sold to them, they have a perfect right to retain the same as against the present plaintiff, who, as deriving his rights from one who can be considered only as the representative of Bissumbhur, must be bound by his acts. The only question, then, which seems necessary for us to determine in this appeal, is, whether the lower court has rightly decided on the facts, that Bissumbhur conveyed to the Gossain defendants the village in dispute as one of those included in the purchase made from him in 1249 B. S.

On this point, the most important and most conclusive document appears to be a decision of the mofussil court passed on the 19th May 1845. That decision contains the abstract of the plaint in the suit, and shows that the action was brought by Bissumbhur himself, after the sale of tuppah Burdeb, in the name of his wife, Pranmonee, the object of the suit being to establish his right to hold the putnee of Gopeenuggur, on the averment that Pranmonee, the ostensible holder, was his benamee agent only, and asserting that she had disputed his right to execute a kuboolyut dated 27th Bysack 1250, as lessor of the defendants, Gossains, for the villages of the said putnee in tuppah Burdeb, which villages are distinctly enumerated in the plaint, *and include Syah as one of them.* This abstract of plaint, then, effectually supports the kuboolyut put forth by the defendant Gossains, as a document which Bissumbhur himself executed in their favor as a lessor of some villages, the proprietary right in which he had sold to them, and, in our opinion, establishes the fact that *Syah* was one of those villages, and must have been passed to them by Bissumbhur. Independent, then, of the testimony of the witnesses to the execution of this kuboolyut, this abstract of the plaint shows that Bissumbhur fully admitted his own execution of the instrument, and that he himself, after the sale, had voluntarily engaged as the lessor for the village in dispute, as one of those the proprietary right in which had been conveyed to them by the sale of tuppah Burdeb. We are also shown on the record a decree which afterwards passed by consent of parties in execution of the judgment of the 19th May 1845, dismissing Bissumbhur's claim against Pranmonee, and awarding her the costs of the suit; and to settle these costs an amicable arrangement, as represented by this decree, was entered into between Brijes-

seree, the widow of Bissumbhur, who had then deceased, and Peareekomul, the daughter and heir of Pranmonee, by which the villages appertaining to tuppah Burdeb were given to Brijesseree at the jumma agreed upon in Bissumbhur's kuboolyut, and the remaining villages comprising the putnee of Gopeenuggur were left to Peareekomul. In this distribution the village of Syah was again included with those in tuppah Burdeb, and were held by Brijesseree, the mother of Ryekomul, who is not likely to have been content with the cession of property which belonged to her daughter. It has been argued that Ryekomul cannot be prejudiced by the acts of others in a suit to which she was no party, and that no mention is made in the abstract of plaint, alluded to above, of the security bond which defendants allege Ryekomul executed as surety for Bissumbhur. Doubtless, if Ryekomul's rights were established, the compromise alluded to could not disturb them; but the inference we draw from the act of her mother in the part she took in the compromise, that if Ryekomul had had any recognised right to the village in dispute, such as possession would have shown, her mother would not have consented to secure a village already in the possession of her own daughter; and we would, moreover, observe that, if Ryekomul was then conscious of having a claim to the village, it is remarkable that she never advanced it during the three subsequent years of possession of Kamdebporé—in fact, up to the time when she sold her rights to Oomachurn Mookerjee.

We do not attach any importance as to whether the security bond was ever executed by Ryekomul, when her father gave the kuboolyut; but, assuming it to have been executed by her, the only inference would be, that she might thereby be held to be cognizant of her father's act, with reference to the particular village now in dispute. But holding, as we do, on the rest of the evidence, that Bissumbhur is clearly shown to have executed the kuboolyut, and thereby to have acknowledged that the sale of tuppah Burdeb to the Gossains conveyed to them the village of Syah, and that Bissumbhur is not shown to have relinquished possession of Kamdebporé at the time he sold tuppah Burdeb, the presumption is inevitable, that he sold *Syah* as part thereof for consideration; and, consequently, that Ryekomul, whether a consenting party or not, as one in whose favor the deed of gift did not take effect until *after* the sale and delivery of possession to the defendants, could not question any title conferred upon them by her father, neither can the plaintiff who derives his rights from her.

We, therefore, confirm the judgment passed below, with costs of this appeal on the appellant.

SUMMARY CASES.

THE 5TH JANUARY 1859.

A. SCONCE, Esq., Judge, and C. B. TREVOR and H. V. BAYLEY, Esqs.,
Officiating Judges.

Case No. 813 of 1858.

*Summary Appeal from the decision of Mr. E. Lautour, Judge
of 24-Pergunnahs, dated 7th December 1858.*

Musst. Prosunnokalee Debea, *Petitioner,*
versus

Mr. Robert Molloy and others, *Opposite Party.*

Baboo Kishenkishore Ghose and Mr. R. T. Allan, for Petitioner,
Ex-parte.

AN application has this day been made to this Court by Prosunnokalee Debea, against the order of the judge of the 24-Pergunnahs, dated the 7th December 1858. She represents that, although this Court, on appeal, reversed the order of attachment under Regulation II. of 1806, passed by the judge, nevertheless that officer, instead of at once transmitting a precept to the collector of Jessore, directing the removal of the attachment, has, disregarding the order of this Court, in modification of his previous order of attachment directed that plaintiffs should file accounts of the profits of the property, adding that, in the event of the tender by petitioner of security to the extent of five times the value of the profits, as per accounts submitted by plaintiffs, the opposite party, he would pass the necessary order for the removal of attachment.

Order of the judge dated 7th December 1858 cancelled, inasmuch as it was not in consonance with the order of this Court dated 9th October 1858, directing the immediate release of the property belonging to petitioner from attachment.

This Court, on the 20th September 1858, directed that the property belonging to petitioner, defendant in the suit, which had been attached under Section V. Regulation II. of 1806, should, for reasons stated in the order, be released from attachment.

The judge, it appears from his order of the 8th December 1858, which is now before us, instead of carrying into effect the order of the Court, has, relying upon the whole statement made by plaintiffs in their original affidavit, modified his former order in the mode stated by appellant in her petition which we are now considering.

The order of this Court was founded upon the facts found by the judge, which were also found by this Court, and the view consequently laid down by this Court was based upon that finding. That order was clearly one for releasing the property attached from attachment. Such being the case, it is not competent for the judge now, relying upon *ex-parte* statements made in the original affidavit of plaintiffs, to change his ground, and, instead of carrying out the order of this Court, upon the ground of those statements to pass an order inconsistent with it; though it is of course competent to the plaintiffs in the suit to file a fresh affidavit, and it is also competent to the judge, after that has been done, if satisfied by

sufficient proof that, on the principle stated in the order of the Court, dated the 9th October 1858, attachment is necessary, to direct the same.

Under this view we cancel the judge's order of the 7th December 1858, and direct him, at once and without further delay, to release the property under attachment from attachment, as directed in this Court's order, dated the 9th October 1858.

The Court regret to have to observe, in an officer of the judge's standing, a tendency on his part to criticise the order of this Court. The judge, it might have been thought, would not now require to be told that obedience and not criticism is the province of a subordinate court; and that if the lower court cannot coincide in the views adopted by the superior Court, such difference of opinion, if expressed at all, should, after the import of the judgment objected to has been fully ascertained, be expressed in respectful language.

THE 12TH JANUARY 1859.

H. T. RAIKES and A. SCONCE, ESQs., Judges, and H. V. BAYLEY, Esq.,
Officiating Judge.

Case No. 445 of 1858.

Summary Special Appeal from the decision of Mr. L. S. Jackson, Officiating Judge of Rajshahye, dated 4th April 1858, affirming a decree of Baboo Punchann Banerjee, Principal Sudder Ameen of that district, dated 30th October 1857.

Brijonath Mujoomdar and others, *Petitioners,*
versus

Gobindmonee Dasse, *Opposite Party.*

Baboos Ramapersad Roy, Sreenath Doss, and Aushootosh Dhur,
for Petitioners.

Baboo Unookoolchunder Mookerjee, for the Opposite Party.

This case relates to an application made by the widow of Bishonath Mujoomdar to execute a decree made in his favor in Rajshahye, the application being opposed by petitioners acting under a will propounded in Rungpore. The zillah judge's decision being confined to his

THIS case was admitted to summary special appeal on the 7th September 1858, under the following certificate recorded by Messrs. C. B. Trevor and H. V. Bayley.

"Bishonath Mujoomdar died in April 1855, leaving a minor son, Dwarkanath. It was alleged by Brijonath Mujoomdar, Haradhum, and Gooroopersad, that, on the 12th April 1855, Bishonath executed a will, investing them with the management of his property. These three parties propounded this will in the zillah court of Rungpore. The summary proceeding of that court, dated the 16th August 1855, states that, after proper notice, no parties had appeared to contest the will, and that witnesses duly proved it. The parties named were, therefore, admitted to the management of the estate of the deceased Bishonath.

"The widow of the deceased Bishonath, Gobindmonee, subsequently applied to the zillah court of Rajshahye, to represent her deceased husband as decree-holder in a case against one Jadubchunder, under a power to adopt, as manager and guardian. The principal sudder ameen of Rajshahye, on the 3rd October 1857, summarily held that the widow's claim was a good one, and that the will propounded at Rungpore was false and collusive.

opinion of the widow being the natural guardian of her son, does not involve her right to act as manager of her husband's estate; and the matter is accordingly remanded to the judge for re-consideration.

"On appeal to the zillah judge of Rajshahye, he, on the 3rd April 1858, upheld the order of the principal sudder ameen, remarking that the widow was the natural guardian of the minor, though the latter was an adopted son.

"The parties whom the zillah court of Rungpore allowed to succeed to the management of the estate of the deceased, Bishonath Mujoomdar, appeal specially, urging that, until the summary order of the zillah court of Rungpore in their favor be set aside by a regular suit, it is not competent for another court to set aside that order on the miscellaneous application of the widow.

"We admit the special appeal to try this point."

JUDGMENT.

This case, as brought before the judge, was for the purpose of determining the legal competency of the widow of the deceased Bishonath, to give effect to a decree made in his favor; and the judge cannot be held to have determined that point in merely considering that the mother was the natural guardian of her son. The widow may be the natural guardian, without being at the same time manager of the estate of her deceased husband. We think, therefore, that the case must go back to the judge, that he may consider whether the orders made in Rungpore in 1855 should be held to be binding on the widow, and, if not, whether the petitioners, as by virtue of the will, or the widow as widow, is entitled to carry on the case pending in the Rajshahye court.

THE 12TH JANUARY 1859.

H. T. RAIKES and A. SCONCE, Esqs., Judges, and H. V. BAYLEY, Esq.,
Officiating Judge.

Case No. 638 of 1858.

*Summary Appeal from the decision of Mr. F. B. Kemp, Judge
of Zillah Backergunge, dated 29th June 1858.*

Mr. Edward Browne, *Petitioner,*
versus

Mr. A. D'Silva, *Opposite Party.*

Baboo Unookoolckunder Mookerjee, for Petitioner.

Baboos Shumbhoonath Pundit and Dwarkanath Mitter, for the
Opposite Party.

An order for costs was made in favor of petitioner in the miscellaneous department; but the proceedings furnish no means for estimating the amount of costs, and as the petitioners failed to ask for a specific order at the first hearing, this application is dismissed.

THIS case was referred to a full bench by Mr. B. J. Colvin, on the 18th November 1858, with the following order.

"On the 6th June 1857, the Court, (present: Mr. Torrens,) in disposing of two miscellaneous cases, adjudged the appellant to pay costs in them. A suit was subsequently brought by the appellant for reversal of the Court's order in dismissal of his claim, which suit he valued at rs. 80,000. Thereupon the respondent (now petitioner) in the miscellaneous cases took out execution for the realisation of costs against the appellant, and estimated them at rs. 250 in each, *i. e.* one-quarter of the amount of pleaders' fees in the regular suit. But the judge has rejected his application, as there is no specification of the amount of costs in the order of the 6th June last, nor any declaration how they are to be calculated.

"Before me, for petitioner, it is argued that they should be calculated at rs. 250, upon the principle that appellant has adopted rs. 80,000 as the value of the property which he has sued for, and that, according to the legal scale, the pleaders' fees in it being rs. 1,000, he is entitled to one-quarter of that amount; while the opposite party says that he is only entitled to the stamp fees in the miscellaneous suit.

"I refer the case, as a novel one, for adjudication by a full bench of three judges, according to the resolution of the 31st May 1856."

JUDGMENT.

The two cases, on account of which these costs are claimed, were—a case for a certificate under Act. XX. of 1841, and a claim to be permitted to represent another party in a suit. These cases in themselves furnish no means of estimating the costs awardable on account of pleaders' fees; and, at the same time, it appears to us that the value of the suit subsequently instituted cannot be adopted as a guide in the matter.

Under these circumstances, as petitioner places before us no data upon which the costs should be calculated, and failed to ask for a specific order from the judge at the first hearing of the appeals, we dismiss this application.

THE 17TH JANUARY 1859.

H. T. RAIKES and A. SCONCE, Esqs., Judges, and H. V. BAYLEY, Esq.,
Officiating Judge.

Case No. 456 of 1858.

*Summary Special Appeal from the decision of Mr. T. Sandys,
Judge of Bhargulpore, dated 31st May 1858.*

Baboo Gobind Singh and others, (Plaintiffs,) *Petitioners,*
versus

Musst. Bhoolunbuttee, (Defendant,) *Opposite Party.*

*Baboo Ramapersad Roy and Moonshee Ameer Ali, for Petitioners.
Baboos Shumbhoonath Pundit and Kishenkishore Ghose, for the
Opposite Party.*

THIS case was referred to a full bench on the 3rd August 1858, under the following remarks recorded by Mr. H. T. Raikes.

"This is an appeal from an order of nonsuit passed by the judge of Bhargulpore for the following reasons.

"The appellants are the *devisees* under a will executed during her life-time by Ranee Lilabuttee, one of the widows of Raja Ajeet Birhma.

"The ranee had instituted this suit in the judge's court, making the devisees co-plaintiffs, in order to establish her right to make the will in question, which right she considered had been called in question by some official proceedings on the part of the collector of the district.

"The exact nature of those proceedings are not detailed by the judge; but it is stated that, during pendency of this suit in his court, the ranee died, and the *devisees*, her co-plaintiffs, sought to carry on the suit and establish the will for their own benefit.

"It is not stated what injury has been sustained by those parties, or by the ranee, so as to make a suit of this nature legally cognizable by the court; and the judge has apparently nonsuited the co-plaintiffs, on the ground that they are not competent to carry on the case.

"I do not myself see any valid objection to the judge's order, but as declaratory actions generally are cognizable by the courts of this country, and I find no precedent in point, I wish to refer this case for the decision of a full bench."

This suit was nonsuited by the zillah judge, on the ground that it was not competent to plaintiff, as devvisor, to sue to establish her own will in her life-time. But associated with the so-called devvisor, were the parties in whose favor her deed was executed, as plaintiffs; and as the declared object of the action was to bring to an issue the power of appointment, asserted by the devvisor, under the authority of her deceased husband, it was held that the action would lie.

JUDGMENT.

After hearing the pleaders on both sides, we think this order of nonsuit should be set aside.

The deed which Ranee Lilabuttee sought to establish is not properly described as her will. The object and intent of the instrument, and of the ranee in executing it, were to give due and ostensible effect to her deceased husband's wishes and directions, and she, in executing the deed, proclaimed those wishes by appointing the heirs, and assigning to them the share of the property her deceased husband had left her for that purpose.

This at least was her recorded intention ; and the opposition given to her act, when publicly notified to the collector of the district, induced her to institute this suit as the means of bringing to issue the fact of her husband's having so authorised her, and her own power to appoint the heirs she had selected.

She, therefore, being in possession of the property, and considering herself bound to assign it as proposed, and the defendants opposing her in the performance of this act, we see no reason to doubt her right to bring the question thus raised by them to issue by this suit, and differ from the judge, who held it to be an action to establish a will by the deviser in her life-time.

Neither do we see any material difference in the character of the action when sought to be carried on by her co-plaintiffs, the heirs appointed by her. The same issue is raised, namely, whether the ranee was really authorised by her deceased husband to appoint heirs ; and in the presence of the heirs so appointed that question can be equally tried and decided. We remand the case, to be taken up on its merits.

THE 19TH JANUARY 1859.

H. T. RAIKES and A. SCONCE, ESQS., Judges, and H. V. BAYLEY, ESQ.,
Officiating Judge.

Case No. 498 of 1858.

*Summary Special Appeal from the decision of Mr. W. Tayler,
Judge of Mymensing, dated 30th April 1858, affirming a
decree of Moulvee Ahmed Buksh Khan, Principal Sudder
Ameen of that district, dated 30th November 1857.*

Eshanchunder Acharj Chowdree and others, *Petitioners,*
versus

Bimola Debea Chowdranee and others, *Opposite Party.*

Buboo Unookoolchunder Mookerjee, for Petitioners.

*Buboos Shumbhoonath Pundit and Sreenath Doss, for the Opposite
Party.*

THIS case was admitted to summary special appeal on the 15th
September 1858, under the following certificate recorded by Messrs.
C. B. Trevor and H. V. Bayley.

“The special appellants, defendants, urge :

1st. That the plaint did not pray for wasilat, and that the
decree did not award wasilat.

2nd. That the rate of wasilat has been taken at the pergunnah
rate, which was cited in the plaint only for the purposes of valuation
of the suit, whereas wasilat should always be calculated in
ascertainment of what has actually been collected by the party in
possession.

“We admit the special appeal, to try if the judge’s order is not
incorrect in the above points.”

JUDGMENT.

On the first point of this certificate we find there was no controversy raised in the court below. The wasilat now in course of litigation is not wasilat before the decree, but wasilat claimed for the period petitioners held possession after the decree was passed. Of course this could not be made a part of the decree, and we are told the liability was made a matter of discussion, and decided upon before the present orders, now made the subject of special appeal, were passed. The first point, therefore, is rejected.

On the second point we find that there was a necessity to take the rates as the basis of calculation, as the lands to which they were applied in calculating wasilat were lands which did not pay money rents to the petitioners, but were occupied by their servants, or constituted the site of the house in which petitioners resided.

We therefore see no reason to interfere with the judgment below, and dismiss this appeal, with costs.

Objection taken to liability for wasilat in execution of a decree held not to apply, as the wasilat in question refers to the period subsequent to the decree.

Held, also, that the amount of wasilat due could not be determined by the amount realised, but by the rate leviable, as the land was occupied by petitioners’ servants.

THE 19TH JANUARY 1859.

H. T. RAIKES and A. SCONCE, Esqs., Judges, and H. V. BAYLEY, Esq.,
Officiating Judge.

Case No. 451 of 1858.

Summary Special Appeal from the decision of Mr. E. S. Pearson, Additional Judge of Dacca, dated 10th April 1858, reversing a decree of Moulvee Mahomed Nazim Khan, Principal Sudder Ameen of that district, dated 4th March 1857.

Radhachurn Photedar and others, *Petitioners,*
versus

Moulvee Abdool Alee, *Opposite Party.*

Baboo Unookoolchunder Mookerjee, for Petitioners, Ex-parte.

Held, that the effect of an attachment under Regulation II. of 1806, *pendente lite*, entitles the decree-holder to a preference on the proceeds of the sale of the property attached, over a party who acquired a mortgage on the same *after* attachment.

THIS case was admitted to summary special appeal on the 7th September 1858, under the following certificate recorded by Messrs. C. B. Trevor and H. V. Bayley.

"The special appellants and others were decree-holders against one Mahomed Tagil, and, during pendency of suit, attached his property under Regulation II. of 1806, to stay alienation.

"One Moulvee Abdool Alee, *after* such attachment, obtained a mortgage of the property from the judgment debtor, and also obtained a decree under his mortgage.

"On special appellants' obtaining their decree in the suit brought by them, they petitioned to obtain the sale proceeds ratably with other decree-holders.

"On this application the judge passed the following order :

'Notwithstanding that the property was attached under Regulation II. of 1806 by other parties, previous to the decree-holder appellant's rehunnama over it, yet, as the scope of the above regulation is only to prevent the defendant from alienating his property, while a rehunnama constituted a distinct lien on the property pledged, this latter must be satisfied first.'

"The special appellants urge, *first*, that, as *their* attachment *preceded* the mortgage to special respondent, Abdool Alee, they should have their decree satisfied before the satisfaction of Abdool Alee's claim can be awarded ; and, *second*, that, if this be not allowed, they should share ratably.

"We admit the special appeal to try these points."

JUDGMENT.

It is to be stated, with the assent of the pleader for the special appellants, that their claim in this matter is only to share ratably in the proceeds of the sale made, and not to be paid in preference to Abdool Alee.

Upon the point of law referred to us, the reason assigned by the zillah judge appears to us unintelligible. That the plaintiffs, special appellants, while their suit was pending, caused attachment to be issued in conformity with Clause 1, Section V. Regulation II. of 1806, is admitted; and it is also admitted that the mortgage acquired by Abdool Alee was acquired subsequent to the attachment. Now, it is expressly provided by the *second* Clause of the Section quoted, that any private alienation, made during the continuance of the attachment, shall be deemed illegal and void, and it is therefore the clear purpose of the law to protect suitors, in the position of the present special appellants, from subsequent alienations made to their prejudice. We accordingly reverse the judge's order, and affirm the order of the first court, with costs.

THE 31ST JANUARY 1859.

H. T. RAIKES and A. SCONCE, ESQs., Judges, and H. V. BAYLEY, ESQ.,
Officiating Judge.

Case No. 355 of 1858.

Summary Special Appeal from the decision of Mr. E. Lautour, Judge of 24-Pergunnahs, dated the 17th April 1858, affirming a decree of Baboo Obhoy Coomar Dutt, Sudder Ameen of that district, dated 3rd March 1858.

Modhoosoodun Roy, *Petitioner,*
versus

Bhyrochunder Kyal, *Opposite Party.*

Baboo Kishensukha Mookerjee, for Petitioner.

Baboo Dwarkanath Mitter, for the Opposite Party.

THIS case was admitted to summary special appeal on the 9th September 1858, under the following certificate recorded by Messrs. H. T. Raikes and J. H. Patton.

"Petitioner states that he holds a decree in a summary suit for rent, and has been sued in regular form in the court of the sudder ameen, by the party against whom the summary award was given, to reverse that judgment.

"The plaintiff in the regular action, on the plea that, if petitioner is allowed to take out execution of the summary award, no property will be forthcoming to satisfy his decree eventually, has deposited the money in the collector's court, and petitioned the sudder ameen to attach it under Section V. Regulation II. of 1806. The sudder ameen first called for security from the petitioner, and, on petitioner's failing to give it, has complied with the requisition of the plaintiff, and attached the money in the collector's hands.

Order made by the zillah judge under Regulation XXVII. of 1806 being founded on the presumption known from the evidence of plaintiff, that defendant meant to dispose of his property, so as to defeat the eventual judgment, is affirmed.

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" In appeal, the zillah judge has upheld the sudder ameen's order.

" Petitioner pleads, in special appeal, that none of the causes stated in Section V., which render such attachment legal, have been urged by the plaintiff, or held by the courts below to be the grounds of this attachment, and that, consequently, the orders of the lower courts are opposed to the law, and petitioner prays for their reversal.

" As it appears that the judge has attached this money, on no other ground than that the petitioner has no other means of satisfying the decree passed against him, and such ground not being one of those referred to in Section V. Regulation II. of 1806, we admit the special appeal, to try whether the order of the judge should not be rescinded."

JUDGMENT.

Messrs. A. Sconce and H. V. Bayley.—Upon the whole, we think no sufficient cause is shown for holding the judge's order in this matter to be beyond the provisions of the law. Against the plaintiff, now before us respondent, a summary decree was made *ex-parte* for arrears of rent. He has sued regularly to set aside the summary award; and, in order to meet the execution of the summary award, he has deposited the sum of rs. 389 with the collector, but to protect himself against the misappropriation of money, which may be determined not to have been due by him, he has applied, under the provisions of Regulation II. of 1806, that the sum so deposited be attached, unless the defendant give adequate security to repay the amount.

The sudder ameen has ruled generally, that the plaintiff had made out his case within the terms of Regulation II. of 1806, and, on appeal, the zillah judge, going more into detail, has affirmed that order. The grounds of the judge's opinion seem to be of a mixed character, as he holds, in substance, both that the taking of the money by the defendant out of the collector's treasury would be a removal beyond the jurisdiction of the court, and also that the defendant is about to make an appropriation of the money, which would put it beyond the reach of plaintiff in execution. Now, while we are not prepared to say, that to draw the money in deposit is in itself a removal from the jurisdiction of the court; on the other hand, we see no ground to interfere with the presumption, which the judge, as well as the sudder ameen, has drawn from the evidence, that in effect the defendant contemplated such an appropriation of the money as is equivalent to the apprehension, contemplated in the law, that the defendant meant to dispose of the property in his possession so as to defeat the eventual judgment.

Mr. H. T. Raikes.—The judge has distinctly found that there is no proof of an intention to remove the property attached beyond

the *local* jurisdiction of the court, but he holds that, as the defendant is destitute of means, a presumption arises that, if he possesses himself of the money in question, there will be no means forthcoming to satisfy an eventual judgment.

This appears to me to be equivalent to re-establishing the *old* process of demanding security from a defendant, to ensure the execution of any judgment eventually passed, and to abolish which process the present law, Regulation II. of 1806, was enacted, and by its provisions requisition of security was to be limited to removal of movable property from jurisdiction, with the *intent* of preventing ultimate execution.

I can only interpret this as a removal from *local* jurisdiction ; and it seems to me that, if the removal from jurisdiction be assumed to mean the inability of the court hereafter to follow the property, then the daily expenditure of a defendant of funds for his own maintenance during the progress of a suit, would be a *removal* from jurisdiction, justifying the court in calling upon the defendant for security, and would, in effect, be equivalent to the old law which has been repealed.

In my opinion, then, the facts on which the judge has called for security do not warrant the order, and I would reverse it.

THE 31ST JANUARY 1859.

H. T. RAIKES, Esq., Judge.

Case No. 749 of 1858.

Kalachand Ghose and Modhoosoodun Bose, (Defendants,) *Petitioners,*
versus

Ramnarain Mookerjee and others, (Plaintiffs,) *Opposite Party.*

Baboo Unookoolchunder Mookerjee, for Petitioners.

THIS case was referred to a full bench on the 2nd December 1858, under the following remarks recorded by Mr. A. Sconce.

"The zillah judge, in an original suit pending before him, has declined, on account of delay, to take an answer from petitioners ; and petitioners appeal against that order. I am doubtful if an appeal from an interlocutory order of this kind can be entertained. The case is not embraced among the interlocutory orders described in the circular order of 2nd February 1849 ; but it is analogous to one of the classes mentioned in that circular, namely, contests relative to the representation of parties who died *pendente lite*. I admit the point for determination by a full bench."

An appeal will lie from an interlocutory order of a zillah judge refusing to receive an answer from defendant in pending suit. An answer is admissible beyond the due period, on cause shown.

The full bench (present : Messrs. H. T. Raikes, A. Sconce, and H. V. Bayley) passed the following order on the 12th January 1859.

“The law does not, in our opinion, require that an answer of a defendant shall be imperatively rejected on the ground of delay in filing the same. It will depend upon the stage to which the case had proceeded at the time of tendering the answer, or to circumstances personal to the defendant ; and therefore we hold that such answer may be admissible on cause shown. We return this case to the miscellaneous judge for decision.”

JUDGMENT.

The judge has not enquired into the most material of the two excuses preferred by petitioners, namely, that the notice of action was not really served as it professes to have been. Remanded for the purpose.

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Collector of Moorshedabad on the part of the Court of Wards v. Rai Moheshnarain Roy and others.

Appeal dismissed, it being proved that the lands claimed by plaintiff formed part of the area measured and given up to plaintiff by the revenue authorities, under orders of the special commissioner. New pleas not urged by the defendant in the court below, and not brought forward in the pleadings, were rejected ... 122

Debee Doss Dutt (after him Goluckchunder Dutt) and others v. Mohunlal Sookul and others and Musst. Dinoodeen Seetul and others.

Held, that in an usufructuary conditional sale, that is, a conditional sale with possession and enjoyment of the rent and profits granted to the mortgagee, it is incumbent on the mortgagor, after notice of foreclosure, if he desire to preserve his equity of redemption, to pay any sum claimed by the mortgagee as still due within the year of grace. If he fail to do so, he acts at his own risk, and if, eventually, after a suit brought by him to redeem, one pica is found to have been due at the expiry of the year of grace, his right to redeem must be declared to have lapsed.

Held also, that in a mortgage of this nature, on a suit for redemption by the mortgagor, when the mortgagee has filed his accounts of collections, with a view of ascertaining whether any equity be outstanding in the mortgage, or not, the account must be made up to the date of the expiry of the year of grace, and not to any subsequent period ... 127

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Nuseeb Lall v. Reet Lall and others.

Case remanded, as the lower courts have disposed of the suits on an erroneous principle. The proper course to be taken in deciding the cases pointed out.

A seeks to obtain possession of four villages, conditionally sold to him by four separate parties, B, C, D, and E, after due notice of foreclosure. B had previously pledged his rights in one village to R, as security for a loan. R sued and got an ex-parte decree, under which, in execution, he sold the rights of B, and purchased them himself, and instituted a suit for possession, making A, as well as B, parties to the suit. The two suits were disposed of together, and the lower courts held that, as R had obtained a decree against B, his right could not be questioned, though A pleaded that the decree was collusive. They therefore gave possession to R, and dismissed the claim of A, on the ground that his mortgage was collusive.

Held, that, as the conditional sale pleaded by A was last in date, the lower courts should have first inquired into its bond fides, irrespective of the decrees pleaded by R. Should it be found to be invalid, the whole claim of A would be rejected. If proved to be valid, A might then question the validity of the ex-parte decree held by R; and if that should prove to be transaction in good faith, A should be put in possession of the property pledged by the other mortgagors ... 132

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Held by a majority of the court, that the terms of the pottah merely provided for the payment of a certain rent as a yearly tenancy, but did not

protect the tenant from enhancement; and that, if he wished to protect himself from enhancement, he should have taken care to have the lease so worded as to guard him from any demand for enhanced rent ... 136

Hurreenarain Gossain v. Doorgasoonderee Debea, widow of Lokenath Moitro, deceased.

Plaintiff being recognised by the civil court as her deceased husband's heir, under will, had a right to sue. In the lease to her husband there was no express stipulation about its lapse or its continuance on his death. But his widow's right to hold during the remainder of the lease was valid by general custom, so long as she paid the rent faithfully, the more so as property had been pledged as security for the observance of all conditions of the lease. Possession and mesne profits during dispossession awarded ... 137

Musst. Beebee Nyamut and others v. Fuzl Hossein and others.

Held, that however objectionable the system of benames transactions may be in theory, it is legal and in common use. It was consequently incumbent on the judge to recognise it, and to follow those rules in discovering the merits of the particular transactions before him, which have been prescribed by the precedents of the Privy Council and of this Court.

Held, also, that in the present case, in which the plaintiffs, special appellants, filed the original deed of sale, the receipt for the purchase money, and various other documents, and in which they allege that, though the purchase was made in the name of Khadim Alee, the real purchaser was their ancestor, Gholam Ghous, and that Khadim Alee was a mere trustee for Gholam Ghous, in whom rested the beneficial ownership, it was incumbent on plaintiffs to prove the payment of the purchase-money by them, and if they did so, any subsequent acts done in the name of the nominal owner would be explained by reference to the original transaction; whereas, if they cannot prove that payment, their case must necessarily fall.

Case remitted for re-investigation by the judge, as suggested in the remarks made by the Court ... 139

Deendyal Chatterjee v. Maharajah Azeemoodowla Bunwaree Kishore and others.

Where one of several joint sharers granted a putnee, whether benamee, for his own benefit only, or as for all sharers, to defendants, and kept him out of possession, and collected the rents till the criminal court put him in possession, the defendants were entitled to have an account of the collections before being sued by the co-sharers for rents ... 142

Brindabanchunder Sircar Chowdree and Grishchunder Sircar Chowdree v. Mr. Edward Roberts, Manager on behalf of the Bengal Indigo Company, and Rajah Gungaischunder Roy.

Plaintiff sought to obtain possession under a deed of conditional sale from Rajah Gungaischunder, after due notice of foreclosure. Defendants, appellants, are in possession as auction purchasers, and plead that the property having been mortgaged to them as security for the payment of the principal sum lent by them to the rajah, he was incompetent to mortgage the property to another party till the whole of their claim was liquidated; and that having obtained a decree for the interest due on their debts, they had sold the property in execution and purchased it. They further pleaded collusion between plaintiff and the rajah to deprive them of possession.

Held, that as the mortgage bond referred to by the defendants was security for the payment only of the principal of their debt, which was liquidated before the expiry of the year of grace, and the property was sold by

- them in execution of their decree for interest, not in virtue of their mortgage, but as simple decree-holders, they purchased the property with all liens created on it by the judgment debtor. Held, further, that where execution of a deed is admitted, and a plea of collusion to set it aside is urged, it is necessary to prove such collusion. Appeal dismissed* ... 144
- Maharajah Moheshur Singh v. Baboo Rumabut Singh.**
- The survey officers awarded possession of 160 out of 279 beegahs claimed. A previously pending suit for the whole being nonsuited after the award, it was held that the limitation prescribed by Act XIII. of 1848 did not apply to the surplus 119 beegahs, and that plaintiffs not having specifically sued to set aside the award was immaterial. Case remanded, for investigation as to the rights of the parties to the 119 beegahs* ... 146
- Shumbhoonath Deka v. Tearam Surma.**
- Held, a plaint was inadmissible where the boundaries given in the original and amended plaint varied* ... 148
- Bhooee Jhaboo Sircar v. Huryanee Bewah, mother of Nazir Mahomed, and others.**
- The special appeal was admitted on the ground of the principal sudder ameen having misconstrued the terms of the replication. That view was taken from the abstract of the pleadings in the decision, which alone was adduced. But on the original pleading being perused, no misconstruction was found. Special appeal dismissed* ... 149
- Ruhmut Alee v. Saaduk Alee and Mahomed Buzl and others.**
- The requirements of the law of pre-emption were not fulfilled by respondent. Lower court's order reversed* ... 151
- Muthoor Dhoolee v. Meghroom Gauzur and others.**
- Case remanded, because lower court was bound under the circumstances to consider not merely whether the alleged dispossession had occurred, but much more to which party belonged the right of inheritance claimed by both* ... 152
- Azeezoonissa v. Gholam Hyder and others.**
- Special appeal dismissed, as the point on which it was admitted did not arise, the principal sudder ameen having held that the defendant cultivated the lands for 1258, and that if the plaintiff had cut the crops the defendant's remedy was to sue for damages* ... 153
- Mohun Lal and others v. Gooroodyal Koowur and others.**
- See case cited* ... 155
- Gudadhur Ghose v. Woomachurn Ghose and Kalachand Ghose.**
- Held, that though, strictly speaking, a Hindoo widow has no general power to execute a hiba-bil-ewuz, which is more in the nature of a sale than a gift, still, in the present case, which is a transaction between the grand-mother and her grandson, the Court consider the transaction in the light of a gift; and, consequently, it was quite competent to the grandmother, her own daughter or her grandson's mother not being alive, to transfer the property to her grandson, so to accelerate his succession and to place him in a position at once of asserting his right to his grandfather's property. Special appeal rejected, with costs* ... 156

Rajah Ajoodhyaram Khan v. Musst. Khemunkeree Dasse and others.
Musst. Khemunkeree Dasse v. Rajah Ajoodhyaram Khan and Rajah Ram-
chunder.

Suit brought by A to recover, under the will of his father B, a village purchased with funds of B, in the name of a younger brother C, and which C, through a foreclosed mortgage, had sold.

The purchase of the village from the funds of the father B is accepted as established; hence is assumed the presumption that the purchase was originally made for the father's benefit as real purchaser, and that the onus of rebutting this presumption was cast on defendant.

It is held to have been proved by defendant that, reckoning from plaintiff's majority, for more than twelve years plaintiff did not enjoy any possessory interest in the village, and, assuming that the original purchase created a presumptive or resulting trust in favor of the father B, it is also held that limitation runs against B, or his representative A, and in favor of the adverse right enjoyed for more than twelve years by C and his vendee.

Held, also, that the nature of this case (that is, the possession and ostensible title of B) so substantially differed from an earlier action between the two brothers, in which, after an award made under Act IV. of 1840, plaintiff sued to recover as heir to his father, that plaintiff was not competent to take twelve years from the date of the decision in the first suit, within which to bring this suit.

Held, also, (in a separate appeal preferred by defendant,) upon the same ground, that plaintiff's failure to include this village in his first suit does not warrant the dismissal of this suit ... 158

Ranee Prosunomoyee, mother and guardian of Koowur Doorganath Roy, minor, v. Ramsoonder Sein and others.

Suit to cancel deeds of lease and assignment by a widow, dismissed in affirmation of the judgment of the lower court. Held, that as the widow was left "mistress" of the property for life, the deeds could not be questioned in her life-time ... 162

Bhunjun Singh v. Mayaram Pandey and others.

Suit being brought to recover possession of certain lands, the first court tried the fact of possession only; on appeal, the case was disposed of on the question of right

Remanded that the question of right may be disposed of by the first court... 166

Abool Furrul v. Mahomed Budul.

Case remanded, to try the question of title as between the claimants to the land sued for, the lower appellate court having confined itself to an adjudication as to the nature of the land ... 167

Anandmoyee Dasse and others v. Brojonath Pal Chowdree and others.

Plaintiffs sued for possession of certain lands of which they had been illegally dispossessed by defendants, the farmers.

Defendants denied the illegal dispossession of plaintiffs, but pleaded that, after the institution of the summary suit, they had sent a sezawul to collect the rents; that the summary suit was decided ex-parte on the 31st August 1853, and the sezawul has collected, and is collecting, the rents ever since. The judge dismissed the plaintiffs' suit.

Held on special appeal, that the possession of a sezawul is a mere temporary possession for a particular purpose; that, on that purpose being effected, it ceases; and that it requires to be renewed in order to be legal.

Case remanded, in order that the judge may determine whether, after the decision of the summary suit ex-parte on the 31st August 1853, the pos-

- session of the defendant continued to be a legal possession or not, and pass whatever order may seem just and proper* ... 168
- Hurmohun Mookerjee v. Musst. Bhullee Bewah, widow of Ramdoolol (deceased), and others.
- Appeal dismissed. The lower court found defendant's lakhiraj title before December 1, 1790, valid, and that limitation barred plaintiff's claim* ... 169
- Buddeenath Bhuttacharj and others v. Collector of Mymensing and others.
- Appeal dismissed, plaintiffs failing to prove possession of the chur within term of limitation* ... 171
- Syed Ameer Alea v. Baboo Bishen Singh and others.
- A zemindar A first granted a mookurruree lease of certain village to B, on a written stipulation that, if B became a defaulter to the amount of three instalments of rent, it should be competent to A to cause the lease to terminate. Afterwards A granted another lease of the same villages to C, at a lower rent than the rent payable by B, transferring to C B's kuboolyut, and giving a written order on B to pay his rent to C. C, showing that the condition of forfeiture expressed in B's kuboolyut had occurred by his default, now sues to set aside B's lease; and it is held by the majority of the Court, in reversal of the judgment below—*
- First, that provided A did not impair the right secured to B, or vary the conditions by which B's tenancy was constituted, it was competent to A, as zemindar, to confer the second lease to C, at his discretion, for the better management of his estate.*
- Second, that though the power to declare B's lease forfeited was not expressly assigned in C's lease, it was competent to C to exercise that power, both because the arrangement entered into by B, for securing the recovery of his rent, was legally preserved to C as representative of the lessor, and because B had, in writing, recognised that power as being vested in C.*
- And, third, that the forfeiture clause was a substantial condition of B's tenancy, fit to be enforced on the occurrence of the stipulated default* ... 174
- Madhub Chand Roy v. Prosunno Chand Roy and others.
- Prosunno Chand Roy v. Madhub Chand Roy.
- Plaintiff sought to recover possession of a share of certain putnees and an indigo concern. As the evidence adduced by him to prove that he had purchased the property, had been in possession, and had been ousted, was considered insufficient, his claim was rejected, and the order of the lower court reversed* ... 184
- Musst. Azeezunissa Beebee and others v. Rajkanth Surma.
- Appeal dismissed, as the point taken when the special appeal was admitted does not arise from the proceedings* ... 189
- Beharree Myeto v. Kassee Myeto and others, and Boderam Myeto and others.
- Vide precedent cited* ... 190
- Syud Irshad Hossein v. Government and others.
- Vide precedent cited* ... 191
- heikh Lal Mahomed v. Bishennath Augustee and others.
- Plaintiff received a pottah for certain lands from A and sowed them. A dispute arose between A and B for the lands, and the possession was*

awarded to B under Act IV. of 1840. who reaped the whole crop. Plaintiff sued to recover the value of the crop, but the principal sudder ameen rejected the claim, because plaintiff had not also sued for the reversal of the decision under Act IV. of 1840.

Held that, as plaintiff was no party to that suit, and claimed to recover the value of his crops only as a ryot, and did not assert any proprietary right, it was unnecessary for him to sue to reverse the award under Act IV. of 1840 ... 192

Salgram Bhuggut v. Sreedhur Paul and Gooroochurn Dey.

Held, that the enquiry of the principal sudder ameen as to the amount of wasilat due to plaintiff is defective. As, however, the plaintiff has consented to give up his wasilat altogether, the order of the lower court, so far as it decrees wasilat, is reversed, with costs in proportion to the amount decreed ... 193

Dhurrum Dey Goshayen v. Bhorthbooh Kyburt.

The issue, whether the land in dispute was plaintiff's service land, or land which he had leased from the defendant, not being fully adjudicated, case remanded, in order that the principal assistant commissioner might investigate whether any ticca lease, and for what extent of land, was given to defendant, and what are his liabilities under its terms with reference to plaintiff's claim in this suit ... 194

Baktear Shikdar v. Shookoor Mahomed Kagzee and Musst. Mahajunee Beebee and others.

The lower court having decided on the merits that, although both plaintiff's and defendant's deeds were proved, defendant's, as of prior date, should have the preference; and, further, that defendant's possession was proved and plaintiff barred by limitation. Special appeal rejected ... 196

Kylasnath Sircar v. Dinonath Chatterjee.

This suit being brought for arrears of rent at a specific rate, as fixed by a kuboolyut, failing proof of that deed, the suit should be dismissed; and case is remanded for a specific finding on that point ... 197

Maharajah Mohessur Singh Bahadoor v. Kunhya Jolaha.

Maharajah Mohessur Singh Bahadoor v. Runjun Jolaha.

Maharajah Mohessur Singh Bahadoor v. Sunghool Jolaha.

Maharajah Mohessur Singh Bahadoor v. Dookha Jolaha.

Maharajah Mohessur Singh Bahadoor v. Uchumbeet Jolaha.

Maharajah Mohessur Singh Bahadoor v. Dookha Jolaha.

Maharajah Mohessur Singh Bahadoor v. Jhoona Jolaha.

Judgment having been given in the court below against special appellant for damage done on account of crops forcibly carried away by his servants, it is held in special appeal that, as the plundered crop was not delivered to special appellant, and the acts of the servants were not done in the ordinary course of their employment, nor with their master's assent, nor under his direction or subsequent ratification, the special appellant was not liable to plaintiffs ... 199

Magaram Chatterjee v. Shan Mundle and Musst. Dripomoyee Debea.

Magaram Chatterjee v. Lochun Pyne and Huree Pyne and Musst. Dripomoyee Debea.

Magaram Chatterjee v. Neetye Dass and others and Musst. Dripomoyee Debea.

Magaram Chatterjee v. Nukkoor Gope and Musst. Dripomoyee Debea.

Magaram Chatterjee v. Koylasnath Bose and others.

Where a putnedar sued ryots upon their kuboolyuts, before a moonsiff, and an intervening purchaser claimed plaintiff's rights as transferred

to himself by sale, it was not necessary for plaintiff to make the purchaser a party to his suits for rents ; he had but to prove his own possession ; no question of title was before lower court ; nor could the purchaser, but ryots only, prefer appeal against the decision ... 201

Putteetpabun Chuckerbuttee v. Ramchurn Pattur and others.

Case remitted to the judge, with directions that he remand the case to the sudder ameen, instructing him to send an ameen into the mofussil for the purpose of making certain enquiries ... 203

Cherungee Lall and others v. Dursun Lall and others.

Remanded for fresh hearing ; the enquiry of lower court having been imperfect, and the bywasta based on a misapprehension ... 205

Hurnath Roy Chowdree v. Indurchunder Baboo and others.

The lender in good faith lent the money to save the widow's estate from sale, on security of a bond and mortgage. The present possessor, though not succeeding as her heir, is liable to the extent of the security, if the widow acted for the benefit of the estate and under necessity. Remanded to try this point ... 207

Golukmonee Dassee v. Kishenpersad Kanoongoe and others.

Nityanund Malutee v. Kishenpersad Kanoongoe and others.

Musst. Unnoporna Debea v. Kishenpersad Kanoongoe and others.

Held by the majority of the Court, that suits by reversionary heirs, though their interest is not vested, but only contingent, to restrain waste or alienations in the nature of waste, by a Hindoo widow, will lie.

Held, also, in accordance with the precedent of Nundlal Baboo versus Bolakee Beebee, that when alienations by a Hindoo widow, utterly subversive of the rights of the heirs in reversion, are proved, and it is shown that, but for the interference of the courts, ultimate loss to the heirs who may succeed eventually will ensue from the conduct of the tenant in tail in possession of the property, this Court, with a view of remedying, or rather of preventing, such loss, will step in and appoint a receiver to take charge of the estate. The reversionary heir may be the receiver, but his appointment as such is not by virtue of his reversionary right, but on a consideration of what is most for the benefit of the estate.

Held, moreover, that when a stranger is appointed as receiver, security should be demanded, but when a reversioner is appointed, his interest in the retention of the management and in the welfare of the property may stand in the place of security, the more especially as it is always in the power of the widow to move the Court, either for the appointment of a fresh receiver or for the demand of security, should the rents and profits be not regularly paid over as directed.

Special appeals dismissed, with costs ... 210

Ranee Brijbuttee alias Ranee Bidyabuttee and others v. Baboo Pertaub Singh Doukur and others.

The sale notices, though not signed by the parties named, were sufficient under the law. The plea, that the purchaser did not pay up his bid, was, under the circumstances, quite invalid. The mortgage bond was accepted by the decree-holder, merely as security against loss, if he allowed the rajah further time to pay up, and was no bar to sale of his estate. Appeal dismissed ... 215

Joynarain Bose v. The Collector of the 24-Pergunnahs and the Superintendent of Embankments.

Remanded ; the issues adjudicated in lower court not arising from the pleadings ; it should try whether, for the land occupied by Government bunds, rent or compensation from Government is not due ... 218

Damudur Micap and others v. Jogeshur Patan, now represented by Lochun-monee and Alhadmonee, guardians of Gugunchund Patan (minor).

The principal sudder ameen in this case was required, under Section IV. Act XXXIII. of 1854, to certify clearly the grounds of his judgment, and the explanation rendered involving both new matter and inconsistencies with first judgment, the case is remanded ... 220

Ramkishore Burmo and others v. Gooroodass Burmo.

Held that the orders of the lower court are without jurisdiction, as it was not competent to the principal sudder ameen, under repeated precedents of this Court, according to the law applicable to the case, to revive execution of the decree of the judge's court, which had been referred to him for execution and had been struck off, without a renewed reference to him by the judge; that, moreover, Act XXVI. of 1852, Section I., did not apply to this case, inasmuch as a petition had been presented for the enforcement of the decree to the judge previously to the passing of that enactment.

Special appeal decreed, with costs ... 221

Chowdree Sheosuhye Singh and others v. Lalla Goureesunker and others.

In the decree under execution, interest upon wasilat was ordered to be paid from a fit date.

Held, that as this expression is indefinite, interest should run from the date of ascertainment of principal ... 223

Komulchunder Saha v. Brijesshuree and Bhugwanchunder Chuckerbuttee.

Petitioner purchased a decree obtained by one Gunganarain Chowdree against Brijesshuree, and subsequently applied for attachment of certain property, consisting of golahs, in execution. On the day following petitioner's application, a party claimed the property as having on that day been sold to him by Deenoonath, the son of Brijesshuree. Nothing further was done by petitioner in execution at the time. The claimant then instituted a regular suit to try the validity of his purchase from Deenoonath, and on petitioner again moving the court in execution, the lower courts have refused to enquire summarily into the bona fides of the sale, as a regular suit has been instituted for that purpose. Held on special appeal that, notwithstanding the institution of a regular suit by the claimant from Deenoonath, petitioner is clearly entitled to a summary enquiry on the same point in execution.

Case remitted to the lower court for enquiry, first, whether the decree purchased by petitioner was a personal one against Brijesshuree, or whether it was for a debt incurred on behalf of her husband, and, secondly, if the latter, whether the transfer to the claimant, Bhugwanchunder Chuckerbuttee, be bona fide or not ... 225

THE 1ST FEBRUARY 1859.

H. T. RAIKES and J. H. PATTON, ESQs., Judges, and G. LOCH, ESQ.,
Officiating Judge.

Case No. 706 of 1858.

Special Appeal from the decision of Mr. A. Pigou, Officiating Judge of Moorshedabad, dated 15th January 1857, reversing a decree of Baboo Ramgopal Shome, Moonsiff of Kandee, dated 19th July 1856.

Ramgunga Bagchee and others, (Plaintiffs,) *Appellants*,
versus

Gourmonee Dassee and others, (Defendants,) *Respondents*.

Baboos Ramapersad Roy and Unookoolchunder Mookerjee, for Appellants.

Baboo Ashootosh Chatterjee, for Respondents.

THIS case was admitted to special appeal on the 17th July 1856, under the following certificate recorded by Messrs. A. Sconce and J. S. Torrens.

"Petitioners sued as an auction purchaser to enhance the rent of certain land termed *jouotree*, held by defendants. The defendants put forward a copy of a decision, dated in 1802, which they held, to show that their tenure had been held at a fixed rate since 1179 B. S. The moonsiff decided that the case referred to was one merely regarding the seizure of crops, and did not show that defendants' tenure was such as to preclude a claim for enhancement.

The lower court held the rent of a tenure to be not liable to enhancement under the provisions of Section XXVI. Act I. of 1845, without determining under which of the protected classes the tenure fell. Case remanded for a distinct finding on this point.

"The judge on appeal lays down the following issues, with others :

"1. Whether the enhancement of rent, fixed *previous to the decennial* settlement, can take place.

"2. Whether defendants' tenure is one of the exceptions enunciated in Act I. of 1845.

"His decision is as follows :—'The word *jouotree* is peculiar to this district, and appears to mean a tenure held at a fixed rent, such tenure having been obtained for a consideration. This court is therefore of opinion that it is synonymous with a *mokurruree* tenure; and as a *mokurruree* tenure is one of the exceptions in Section XXVI. Act I. of 1845, the respondents had no power, as auction purchasers, to make any enhancement of rent.' He therefore reverses the decision of the moonsiff.

"In special appeal it is urged that the issues, even as tried by the judge, did not determine the question before him, as there was none on the point, of whether the rent had been fixed twelve years prior to the decennial settlement; and, further, that he had not considered the objections, as stated in the moonsiff's decision, in respect to the copy of the decision of 1802.

“ As it does not appear that the judge has tried whether the jumma was fixed twelve years before the decennial settlement, or considered the other point referred to in the above objections, we admit the special appeal, to try whether his orders, reversing those of the lower court, should be upheld.”

JUDGMENT.

By Section XXVI. Act I. of 1845, four classes of tenures are protected from enhancement : the first comprises tenures held as mokur-ruree at a fixed rent for twelve years previous to the permanent settlement ; the second comprises tenures existing at the decennial settlement, which have not been, or may not be, proved to be liable to increase of assessment, on the grounds stated in Section LII. Regulation VIII. of 1793. It is unnecessary to notice the other two classes, as the tenure in dispute must fall within either the first or second class ; but the judge has come to no distinct finding as to the class within which it is comprised. We, therefore, remand the case to the judge, with instructions to him, after considering the evidence adduced by the respondents, to pronounce distinctly whether the tenure is comprised in the first or second class of Section XXVI. Act I. of 1845.

THE 1ST FEBRUARY 1859.

H. T. RAIKES and J. H. PATTON, Esqs., Judges, and G. LOCH, Esq.,
Officiating Judge.

Special Appeals from the decision of Moulvee Itrut Hossein Khan, Principal Sudder Ameen of Rungpore, dated 22nd January 1858, affirming decrees of Baboo Muddunmohun Dutt, Moonsiff of Buddyakhalee, dated 26th June 1857.

Cases Nos. 370, 373, and 374 of 1858.

Pundit Narain Dass, (Defendant,) *Appellant*,
versus

Ranee Surnomoyee, (Plaintiff,) *Respondent*.

Case No. 371 of 1858.

Ramsoonder Dass, (Defendant,) *Appellant*,
versus

Ranee Surnomoyee, (Plaintiff,) *Respondent*.

Case No. 372 of 1858.

Gopeechurn Dass, (Defendant,) *Appellant*,
versus

Ranee Surnomoyee, (Plaintiff,) *Respondent*.

Case No. 376 of 1858.

Maniknarain Dass, (Defendant,) *Appellant*,
versus

Ranee Surnomoyee, (Plaintiff,) *Respondent*.

Case No. 377 of 1858.

Moocheeram Dass, (Defendant,) *Appellant*,
versus

Ranee Surnomoyee, (Plaintiff,) *Respondent*.

Case No. 378 of 1858.

Lukhee Dass, (Defendant,) *Appellant*,
versus

Ranee Surnomoyee, (Plaintiff,) *Respondent*.

Baboos Unookoolchunder Mookerjee and Dinnonath Mitter, for all the Appellants.

Baboo Ramapersad Roy and Moonshee Ameer Alee, for the Respondent.

THESE cases were admitted to special appeal on the 23rd June 1858, under the following certificate recorded by Messrs. C. B. Trevor and G. Loch.

"The petitioners were defendants in eight different suits, before the moonsiff of Chowkee Buddyakhalee. In four of the cases the decisions

With reference to a former ruling, cases remanded for hearing to lower court as appealed within time.

of the moonsiff were passed on the 26th June 1857, copies of the decisions tendered to their vakeels on the 8th July, the petitions of appeal presented on the 25th July, and the reasons of appeal on the 17th August 1857. In two of the cases the decisions of the moonsiff were passed on the 22nd June, copies of the decisions tendered to appellants' vakeels on the 8th July, the petitions of appeal filed on the 21st June, and the reasons of appeal on the 17th August 1857. In two other cases the decisions were passed on the 27th June 1857, copies of the decisions were tendered on the 8th July, the appeal petitions filed on the 25th July, and the reasons of appeal on the 17th August 1857.

"Now, from the foregoing statement, it is clear that the petitions of appeal were filed, as required by Clause 1, Section XLVI. Regulation XXIII. of 1814, *within* thirty days after the date on which the copies of the decisions had been tendered to the parties concerned, and that the reasons of appeal were filed *beyond* that period. Under the ruling, therefore, of this Court, in the case of Prandhun Chuckerbuttee *versus* Gudadhur Dey, (Decisions of 1857, page 34,) those reasons cannot be admitted, they not having been filed *within* the period of appeal.

"It has, however, been urged before us, that, rejecting the reasons of appeal, and looking only to the first petitions of appeal, these cases can legally proceed to a hearing before the judge, and should have been heard by him, the law being silent as to necessity for the entrance of any reasons for dissatisfaction in the petitions of appeal from the decisions of moonsiffs.

"We observe that several special appeals have been admitted to try this point. As, moreover, it seems to us to have very considerable support from the words of the law applicable to the subject (Section XLVI. Regulation XXIII. of 1814), we admit these special appeals to try the point now raised before us."

JUDGMENT.

As the Court has already recorded its opinion on the point mooted in this certificate, it is only necessary for the Court to follow the precedent of the 10th August 1858, *in re* Hubeeboonissa Beebee, petitioner. These eight cases are accordingly remanded to the lower appellate court, to be decided on their merits.

THE 1ST FEBRUARY 1859.

H. T. RAIKES and J. H. PATTON, ESQs., Judges, and G. LOCH, Esq.,
Officiating Judge.

Case No. 36 of 1858.

Special Appeal from the decision of Baboo Panchanun Banerjee, Principal Sudder Ameen of Rajshahye, dated 6th February 1857, affirming a decree of Baboo Gungachurn Shome, Moonsiff of Boalea, dated 27th May 1856.

Shah Shoojaet Alee *alias* Meer Alee and Ram Singh Chuprassee,
(two of the Defendants,) *Appellants*,

versus

Shahaboodeen, (Plaintiff,) and Hubeeboonissa and others, (Defendants,)
Respondents.

Moulvee Murhumut Hossein, for Appellants.

Moonshee Ameer Alee and *Moulvee Mahomed Iemal*, for (Plaintiff,) Respondent.

THIS case was admitted to special appeal on the 22nd January 1858, under the following certificate recorded by Messrs. B. J. Colvin and J. H. Patton.

Lower court's order confirmed, awarding recovery of lands to plaintiff, illegally occupied by defendants under an Act IV. decree. As both parties claimed on the basis of lease from A.'s heir, the lower courts were to determine which of their allegations of fact was true, and were not bound to enquire into A.'s rights.

"Plaintiff, special respondent, on the allegation that the land in suit had been let by one Oomdee Meean to Muneeroodeen, on whose death it had been sub-let by that person's wife, Hubeeboonissa, and nephew, Shuffeeoodeen, to plaintiff, sued for re-possession of it, on the ground that he had been ousted from it by an Act IV. of 1840 order passed in favor of Shoojaet Alee and Ram Singh, defendants, special appellants, the former of whom asserted that he had let the land to Muneeroodeen, on whose death his nikah wife, Beeshoo Beebee, had relinquished possession of it to him, so that he had re-let it to Ram Singh. The lower courts decided in favor of plaintiff, on the ground that his statement, that Hubeeboonissa and Shuffeeoodeen had re-let the land to him, was true, and that the tale of relinquishment by Beeshoo Beebee was not established.

"It is urged, in special appeal, that the principal sudder ameen should have enquired into the questions as to whom the land belonged and who had let it to Muneeroodeen, and whether it could be sub-let without the consent of the owner, which the principal sudder ameen had refused to investigate, as irrelevant in this suit, citing as a precedent the case, No. 373 of 1851, decided on the 15th February 1853, in which a suit to recover possession and mesne profits, on the ground of illegal possession, was thrown out, and the decision of the lower court in favor of plaintiff reversed, the lease under which the defendants held being considered

to be proved genuine and sufficient to form a *bond-fide* title to occupy.

"It would appear that the principal sudder ameen has misapplied the precedent; for in it the pottadar was in possession and defendant, whereas in this the sub-tenant of the pottadar was out of possession and sued for recovery of possession. We, therefore, admit the special appeal, to try the applicability of the precedent to this case, and whether plaintiff, special respondent, was not bound to prove the right of his lessors before he could recover possession."

JUDGMENT.

We see no reason to interfere with the judgment of the lower court on the ground mooted in this certificate.

The petitioner, Shoojaet Alee, appears to have obtained possession of the land under an Act IV. of 1840 case, and now supports his right to hold possession, on the ground that the land was let by him to Muneeroodeen, who, dying, was succeeded by his nikah wife, Beeshoo Beebee, who, by deed of relinquishment, gave up the land, which petitioner then let to Ram Singh, his co-petitioner. The other side also date their dispute from the date of Muneeroodeen's death, who, they say, was not succeeded by his nikah wife, Beeshoo, but by his first wife, Hubeeboonissa, who then sub-let to them. Here then is a distinct agreement on both sides, that Muneeroodeen's heir succeeded to possession, and the right of such heir so to do is admitted by petitioner, for, although he asserts a person was that heir other than the one assumed by defendants, he allows that the heir only relinquished by a voluntary act to that effect. If, then, it is proved to the satisfaction of the lower court that Beeshoo Beebee did not succeed, and, consequently, did not *relinquish*, the issue on that point is decided in favor of the other asserted heir, and the right of possession of petitioner, in the mode asserted by him, to the land in question, is not proved; and it was not necessary to go further into the rights of the contending claimants to ascertain who let the land to Muneeroodeen, as, even if petitioner did do so, he also assumed in this case the necessity of taking an *istafa* from the heir before retaking possession.

We, therefore, do not think it was necessary to try the case as pleaded by petitioner, and reject this appeal, with costs.

THE 1ST FEBRUARY 1859.

H. T. RAIKES and J. H. PATTON, ESQS., Judges, and G. LOCH, ESQ.,
Officiating Judge.

Case No. 865 of 1858.

*Special Appeal from the decision of Moulvee Abdool Uzeez Khan,
Principal Sudder Ameen of Purneah, dated 27th March 1857,
reversing a decree of Fuqueera Lall, Officiating Moonsiff of
Bahadoorgunge, dated 1st September 1858.*

Sheikh Ughooree, (Plaintiff,) *Appellant*,
versus

Sheikh Wahid Alee and others, (Defendants,) *Respondents*.

Moulvee Murhumut Hossein, for Appellant.

Moulvee Mahomed Ismail, for Respondents.

THIS case was admitted to special appeal on the 13th November 1857, under the following certificate recorded by Messrs. B. J. Colvin and J. H. Patton.

"This was a suit on bond, decided against petitioner, plaintiff, on appeal. The defendant admitted execution of bond, but denied receipt of consideration money; and this being established to the satisfaction of the principal sudder ameen, he dismissed the claim.

"It is urged, in special appeal, that, by Section XV. Regulation III. of 1793, it is sufficient to have the bond proved, as both conditions, namely, execution of deed and receipt of money, are not necessary. This argument is founded on the use of the word *or* instead of *and* in the Section alluded to, from which it is contended that proof of either one or other condition is sufficient.

"We admit the special appeal to try the point."

JUDGMENT.

The circumstances of this case, as shown by the record, are somewhat peculiar.

The present petitioner sued ten defendants on a bond, and neither of the defendants filed any answer to the plaint. Petitioner, when called upon for proof, gave a list of six witnesses, and, in the month of May following, tendered the evidence of three of them, which went to show that the bond in suit was executed in their presence, but that at the time no consideration passed, it being understood by the witnesses that the amount had been previously paid. As at the time when their evidence was heard, one of the defendants was said to be in court, the moonsiff called upon him for a reply to the suit, and he then admitted that the bond had been executed by himself and co-defendants; but as no consideration had passed, they disputed the claim. On this the evidence of two other witnesses was tendered by the plaintiff in the following

In a suit on a bond, the courts are not restricted to proof of execution of deed only, or of payment of consideration only, nor bound to take proof on both; but to act according to the exigencies of each case.

month, who deposed to the previous payment of the money and to the subsequent execution of the bond. On this proof a decree was passed by the first court; but on appeal the principal sudder ameen, doubting the evidence of the two last witnesses as to payment, on the ground that they were not brought forward in the first instance, and holding that no consideration passed at the time of execution, and that no distinction had been made by the plaintiff as to the nature of the evidence to be given by his witnesses, dismissed their claim.

This certificate now asks, whether the principal sudder ameen was right in requiring proof of payment when execution was admitted, and whether the provision of Section XV. Regulation III. of 1793 did not require that the courts below should decree the amount of the bond on proof of execution only. In the present case, as the witnesses to the bond, who were first examined, could not speak to the fact of any consideration being passed, we see no illegality in the court below having received evidence on that point; and the evidence so tendered being within the competency of the court to consider, it was also within its competency to decide upon its value. We cannot, therefore, interfere with the court's judgment in this case. On the point, whether the provisions of Section XV. Regulation III. of 1793 require the court to look only at proof of execution, we consider that no such imperative rule is therein laid down. The prohibition contained in the law is, not to decree without proof that the execution has been made in the presence of two credible witnesses, but does not bind the court in all cases to decide the claim on such evidence only.

THE 3RD FEBRUARY 1859.

J. H. PATTON, Esq., Judge, and G. LOCH, Esq., Officiating Judge.
Petition No. 1487 of 1858.

Application for Special Appeal from the decision of Moulvee Mahomed Nazim Khan, Principal Sudder Ameen of Dacca, dated 9th July 1858, reversing a decree of Mr. T. C. Pennington, Sudder Moonsiff of that district, dated 28th July 1857, in the case of

Musst. Hurrosoonderee and others, *Plaintiffs*, Petitioners,
versus

Manikchand Bysack and others, *Defendants*.

Baboo Unookoolchunder Mookerjee, for Petitioners.

Baboos Shumbhoonath Pundit and Bungsheebuddun Mitter, for the Opposite Party.

It is hereby certified that the said application is granted on the following grounds.

Plaintiffs, petitioners, sued to recover possession of lands belonging to their talook Radakishen, kismut Burtpore, from which, they allege, they were ejected by an order of the magistrate, under Regulation XV. of 1824, on the 11th March 1839. The defendants allege that the lands belong to their talook Rughoram, kismut Kulgaon. The lower court, rejecting the plea of limitation, gave a decree for possession on the merits. On appeal, the principal sudder ameen dismissed the suit, on the ground of limitation, making a calculation, by which he showed that, even if the time during which the nonsuited cases instituted by plaintiffs were pending be deducted, yet the present action was not within time, and adding that it was obvious from a report of Gungadhur Ameen, dated 9th Srawun 1240 B. S., that Kadir Buksh, whom the defendants now represent, was put in possession by an ameen of mouzah Kulgaon, which he had purchased at auction, and from the decision under Regulation XV., dated the 11th March 1839, it appears that the lands then in dispute were admitted by plaintiffs to be the subject of the present suit; and he, therefore, concludes the case to be barred by the statute of limitations.

Suit remanded, as the lower court had applied the statute of limitations erroneously.

In special appeal the objection urged is, that the principal sudder ameen has calculated the time from the decision under Regulation XV. to the institution of the present suit erroneously. The case under Regulation XV. of 1824 was disposed of on the 11th March 1839, and the present case was instituted on the 26th June 1856, after the lapse of 15 years 3 months and 16 days. During this interval a suit for this property between the same parties was instituted on the 6th June 1850 and nonsuited on the 27th July 1852. A fresh suit

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was instituted on the 19th February 1853 and nonsuited on the 29th April 1854. In allowing for the time during which the nonsuited cases were pending, the principal sudder ameen has calculated the period of the first case to be 2 years and 21 days, whereas the proper time was 2 years 1 month and 21 days ; and, though he has calculated the period of the second case correctly, *viz.* 1 year 2 months and 11 days, yet the total of the two periods, *viz.* 3 years 2 months and 2 days, is incorrect, the proper period being 3 years 4 months and 2 days ; and if this period be deducted, the plaintiffs are within time.

It was observed by the respondents, that this is not the only manner in which the principal sudder ameen has applied the statute of limitation ; for he goes on to show, that the former proprietor of Kulgaon got possession of these lands through an ameen of the civil court long before the case under Regulation XV. of 1824 was commenced, and, consequently, the date of plaintiffs' dispossession was long anterior to that decision, and if that date be taken, plaintiffs are altogether out of court.

The calculation made by the principal sudder ameen is evidently erroneous. Plaintiffs are entitled to a deduction of 3 years 4 months and 2 days, during which their nonsuited cases were pending ; and by this calculation plaintiffs are within time, having instituted the present suit 11 years 11 months and 14 days after the decision of the magistrate, passed under Regulation XV. of 1824 ; and we think also that the principal sudder ameen is incorrect in assuming that the report of Gungadhur Ameen, dated 7th Bhadur 1240 B. S., comprises the land now in dispute, for that makes no specification of particular plots, but simply gives Kadir Buksh possession of his auction purchased estate of Kulgaon. Having assumed this to be the case, and it being admitted by plaintiffs that the lands now in litigation are the same as those comprised in the Regulation XV. case, the principal sudder ameen dismisses the suit on the ground of limitation. We think, however, that before the statute of limitations can be applied in this manner, a distinct finding must be come to, whether the lands now in dispute were or were not comprised in the area, of which possession was given to Kadir Buksh, by the ameen, in 1240 ; and that the principal sudder ameen was wrong in resting his judgment in any way upon the decision under Regulation XV. of 1824, which it is the object of the present suit to set aside. We, therefore, remand the case, to be tried with reference to the above remarks. The principal sudder ameen will ascertain whether the lands in dispute are comprised in the ameen's report of 1240, and will then proceed to apply, or otherwise, the statute of limitations according to the finding he arrives at.

THE 12TH FEBRUARY 1859.

B. J. COLVIN, Esq., Judge, and G. LOCH, Esq., Officiating Judge.

Petition No. 1419 of 1858.

Application for Special Appeal from the decision of Mr. W. Tayler, Judge of Mymensing, dated 16th June 1858, reversing that of Moulvee Ahmed Buksh Khan, Principal Sudder Ameen of that district, dated 27th July 1857, in the case of
Anundmoyee Chowdrain, Plaintiff,

versus

Bishonath Abustee, (Petitioner,) and others, Defendants.

Baboo Ramapersad Roy and Mr. R. T. Allan, for Petitioner.

Baboo Unookoolchunder Mookerjee, for the Opposite Party.

It is hereby certified that the said application is granted on the following grounds.

Case remanded for the determination of two points material to the decision of the case.

Two points are urged in special appeal : 1st, that there was no privity between the plaintiff and the defendant, petitioner, which could entitle the former to bring an action against him ; and, 2nd, that as Sheebchunder, the father and guardian of Greeshchunder, the adopted son of Hurromonee, whose adoption had not then been set aside, had assented to the payment of money, it was immaterial whether Anundmoyee had given her consent to its payment or not ; and she could not, under these circumstances, have an action against the defendant, petitioner.

Kirteechunder Chowdree died, leaving a widow, Anundmoyee, and a minor son, Bhoobunmohun, who married Hurromonee. Bhoobunmohun died during his minority, without issue. Anundmoyee and Hurromonee both adopted sons, and were in joint possession of the property of Kirteechunder. Hurromonee incurred a personal debt to the defendant, Bishonath Abustee, who sued and obtained a decree against her. She died in 1257 ; and, owing to the quarrels between the two adopted sons, the property was attached by the collector, under orders of the civil court, in 1259, and the collections kept in his custody. The defendant, decree-holder, applied for liquidation of his decree from the assets in the collector's hands, and, as alleged, he received the amount under orders of the court. The two adoptions were finally set aside by a decision by the Sudder Dewanny Adawlut, in 1855, corresponding with 1262, and the whole of Kirteechunder's property reverted to the possession of Anundmoyee. She now brings a suit against the petitioner, decree-holder, to recover the sum paid to him from the collections of the estate in liquidation of his claim against Hurromonee, on the plea that, the adoption of Greeshchunder being set aside, the assets in the

collector's hands belong exclusively to her, and were not available for the payment of the personal debts of Hurromonee.

We can gather from the decision of the judge, that the assets in the collector's hands were from collections made subsequent to the death of Hurromonee, she having died in 1257, and the attachment of the property having been made in 1259. But it does not clearly appear whether these collections were for a period previous to the death of Hurromonee, though realised subsequent to that event. If they were, there can, we think, be no question that petitioner, decreedar, was entitled to have them applied to the liquidation of his decree, for they must be considered as sums to which Hurromonee was entitled. Further, the judge has found that payment of the money was not made with the consent of Anundmoyee; but it does not clearly appear in what capacity Sheebchunder acted, whether as an agent of Anundmoyee, or as guardian to the minor, Greeshchunder. As a distinct finding on both the above points is material for the determination of the case, we remand it to the judge, to dispose of it with reference to the above instructions.

THE 12TH FEBRUARY 1859.

J. H. PATTON, Esq., Judge, and G. LOCH, Esq., Officiating Judge.

Petition No. 1221 of 1858.

Application for Special Appeal from the decision of Mr. R. Abercrombie, Judge of Dacca, dated 29th May 1858, reversing that of Moulvee Mahomed Nazim Khan, Principal Sudder Ameen of Dacca, dated 24th July 1857, in the case of

Radhakanth Bose *alias* Khurkoo Bose, *Plaintiff*, Petitioner,
versus

Mirza Mahomed Hossein and others, *Defendants*.

Baboos Ramapersad Roy and Kishenkishore Ghose, for Petitioner.

Baboo Jugdanund Mookerjee and Mr. R. T. Allan, for the Opposite Party.

That a plaint is struck off the file on application, is not a cause bringing plaintiff under the penalty of dismissal on default under Act XXIX. of 1841.

It is hereby certified that the said application is granted on the following grounds.

Plaintiff purchased talook Izzutoonissa Begum, at a sale for arrears of revenue, on the 1st October 1836, under Regulation XI. of 1822, and was ordered to be put in possession by an ameen of the civil court. Defendants opposed his possession in certain villages, and his application to the judge was rejected on the 29th April 1844, who referred any party aggrieved to a regular suit; and the above order was confirmed by this Court on the 15th March 1842. The plaintiff then brought a suit to obtain possession on the 20th

January 1848. On the 9th May following he applied for permission to correct a defect in the plaint. This petition was filed with the record. He then filed a further petition, requesting that the case might be struck off the file, as he intended to amend his plaint and file a fresh suit. The case was struck off on the 12th November 1849, and plaintiff instituted a fresh suit on the 6th July 1850. The plea of limitation in bar of the suit was rejected by the principal sudder ameen, who held that plaintiff was entitled to have the period during which the previous suit was pending deducted, and, in such case, he would be within time. On appeal, the judge held, that, as the case was not nonsuited, but struck off, that order was equivalent to dismissal on default; and as Section II. Act XXIX. of 1841 particularly declares that dismissal under that Act does not prevent lapse of time under the law of limitation being incurred, he considered the hearing of the suit barred under the statute of limitations, and, reversing the decision of the lower court, dismissed the plaintiff's claim. In special appeal it is urged that the law, upon which the judge rests his judgment, is not applicable.

We think the judge has misapplied the provisions of Act XXIX. of 1841. Suits under that Act are dismissed on default; but, in the present case, the plaintiff was guilty of no default, but, as shown by his petition of May 1848, was engaged in carrying on his suit, and that suit was, on his own application, struck off the file. The use of such words as "struck off the file" in the order cannot, under any circumstances, bring the plaintiff under the penalty incurred for default under Act XXIX. of 1841; and, deducting the period of 1 year 9 months and 22 days allowed by the principal sudder ameen, the plaintiff is clearly within time. We, therefore, reverse the order of the judge, and remand the case, to be tried and disposed of on its merits.

THE 14TH FEBRUARY 1859.

- C. B. TREVOR and H. V. BAYLEY, ESQS., Officiating Judges.
Petition No. 731 of 1858.

Application for Special Appeal from the decision of Mr. J. Grant, Judge of Dinagepore, dated 11th February 1858, affirming that of Mr. J. Reily, Principal Sudder Ameen of that district, dated 7th August 1855, in the case of

Mr. J. J. Gray, Plaintiff, Petitioner,
versus

Mr. P. McArthur and others, Defendants.

*Baboos Jugdanund Mookerjee and Kishenkishore Ghose, for
Petitioner, Ex-parte.*

Case remanded for local investigation by a properly constituted ameen, to see whether the lands belong to the property alleged by plaintiff, or to that alleged by defendant.

It is hereby certified that the said application is granted on the following grounds.

When this case was first before us, we sent for the record and the respondent. The respondent has not appeared.

The plaintiff, Gray, sued the defendant, McArthur, and the deputy collector of Maldah, for possession of 303 beegahs 10 cottahs of land and mesne profits.

Plaintiff claimed the land as belonging to a resumed Government estate called Shahpoor Paharpoor, of which plaintiff had the farming settlement, alleging that defendant had dispossessed him.

Defendant stated that the lands belonged to a Government escheated estate, called Alumpoor, of which he had a farming jote ; and that they were thus properly in his possession.

The principal sudder ameen dismissed the suit, and the judge upheld the decision.

The plaintiff appeals specially, urging that the judge has gone only on the map of an ameen made before, and not with reference to, this controversy ; that the judge has not considered plaintiff's proofs, or recorded any opinion on them ; that there is nothing to show, as recorded by the judge, that defendant, McArthur, stated that he petitioned for plots A and B, to be settled with him ; that McArthur's petition was for settlement of the lands as Shahpoor ; and that, in respect to plot D, the judge refers to *defendant's* proofs, but in no way to plaintiff's.

We find the chittas of 1244 are mentioned by the plaintiff as showing what he claims, and that the principal sudder ameen has examined these, as well as chittas of 1242, but that the judge in no way refers to either of these chittas. We further find that McArthur's petition for settlement speaks of the land he there asks for as of Shahpoor. The judge has found this to be the case in regard to the plot marked C ; but, looking to the terms of the

petition, we do not see that that plot is more specifically referred to than the others.

We do not find that, since this litigation arose, any ameen has been deputed to investigate, on the spot, whether the measurement papers of Shahpoor or (if there be any) of Alumpoor show the lands in dispute to be in the one or other property ; nor what were the measurement papers on which the farming settlement or jotedaree tenure of the parties respectively was adjusted.

The purposes of justice will, in our opinion, be best served, in such a case as this, where the judge's decision is defective, as above shown, by an order of remand, with a view to the judge's remitting the case to the court of first instance, with an instruction to depute a properly constituted ameen to make a local investigation and map, with reference to the contention of the parties, and to see how the chittas of settlement of Shahpoor Paharpoor and also of Alumpoor (if there be any of it) bear upon the right of either party ; and generally to make such enquiries and report as may best aid the court to come to a correct conclusion, as to whether all or what portion of the land claimed by plaintiff as Shahpoor Paharpoor belongs to it, or how far defendant's averment, that he holds it as a jotedar of the escheated mehal of Alumpoor, is correct. The principal sudder ameen will then take into consideration, with such report, all the documentary evidence on the record, and pass such decision as he thinks proper. We remand the case accordingly.

THE 14TH FEBRUARY 1859.

A. SCONCE, Esq., Judge, and D. I. MONEY, Esq., Officiating Judge.

Petition No. 1056 of 1858.

Application for Special Appeal from the decision of Moulvee Mahomed Haneef Khan, Principal Sudder Ameen of Patna, dated 24th March 1858, affirming that of Baboo Hursahoye Singh, Additional Moonsiff of Barh, dated 28th December 1857, in the case of

Sheobur Singh and others, *Plaintiffs,*

versus

Chowdree Jeebun Singh and others, *Defendants,* Petitioners.

Baboo Kishensukha Mookerjee, for Petitioners.

Moonshee Abbas Alee Khan, for the Opposite Party.

THIS was a suit for a share of malikana, derivable from the ryots holding certain invalid lands. Petitioners denied plaintiffs' right, pleading limitation, and asserting that the ryots paid their rents to them.

Lower court founded a decision on a supposed admission which did not exist. Remand.

The ground of special appeal is, that the principal sudder ameen has founded his decision on a supposed admission made by the appellants in their appeal to him. We find no such admission, nor can the pleader for plaintiffs show us to what statement in the appeal the principal sudder ameen can be supposed to have referred. On the contrary, the entire tenor of the appeal is to deny plaintiffs' right to the malikana claimed. We accordingly are necessitated to remand the case, that the principal sudder ameen may re-dispose of it upon the issues taken before him.

THE 14TH FEBRUARY 1859.

B. J. COLVIN, Esq., Judge, and C. B. TREVOR and G. LOCH, Esqs.,
Officiating Judges.

*Regular Appeals from the decision of Baboo Gobindchunder
Chowdree, Principal Sudder Ameen of Moorshedabad, dated
1st December 1856.*

Case No. 11 of 1857.

Mr. H. Deverell, on the part of Messrs. Watson and Co., (Defendant,) *Appellant*,
versus

Rai Moheshnarain Roy, (Plaintiff,) and Shamanund Roy and others,
(Defendants,) *Respondents*.

Baboo Ramapersad Roy and Mr. R. T. Allan, for Appellant.
Baboo Shumbhoonath Pundit, for Respondents.

No. 131 of 1857.

Collector of Moorshedabad on the part of the Court of Wards,
(Defendant,) *Appellant*,
versus

Rai Moheshnarain Roy, (Plaintiff,) and others, (Defendants,)
Respondents.

Baboo Ramapersad Roy, for Appellant.
Baboo Unnodapersad Banerjee, for Respondents.

Suit laid at Company's Rupees 11,594-8a.-5g.-2c.

Appeal dismissed, it being proved that the lands claimed by plaintiff formed part of the area measured and given up to plaintiff by the revenue authorities, under orders of the special commissioner. New pleas not urged by the defendant in the court below, and not brought forward in the pleadings, were rejected.

THE plaintiff sued to recover possession of certain lands belonging to his zemindaree Shokallypoor, of which he had been deprived by an order of the magistrate under Act IV. 1840, dated the 25th April 1857. It appears that the four villages, Allatoly, Ramchunderpoor, Koodalkati, and Ganti Juggernath Singh, were destroyed many years ago by the encroachments of the river. Subsequently the area measured and given up to plaintiff by the revenue authorities, under orders of the special commissioner. New pleas not urged by the defendant in the court below, and not brought forward in the pleadings, were rejected.

quently alluvial accretions took place, and a suit for the resumption of the new accretion, known as Allatoly, was instituted. Another suit for the accretions, known as Ramchunderpoor, Koodalkati, and Juggernath Singh, was also commenced. The former suit was decreed in favor of Government; the latter was struck off by the collector under the provisions of Act IX. of 1847. An appeal was preferred by the plaintiff to reverse the decision in the former suit, and the special commissioner, on the 29th July 1847, directed the collector, after ascertaining the area of the new formation, to make over to the plaintiff so much land as was entered in the ruqbabundee of the estate, and to resume any lands in excess. The area, on measurement, was found to be 14,569 beegahs 14 cottahs, of which 11,688 beegahs 5 cottahs were given up to plaintiff, and 2881 beegahs 8 cottahs remained and were settled with him in December 1850. Disputes subsequently arose between plaintiff and the defendants, Watson and Co., who are farmers of the adjacent estate, Bungshy-buddunpoor, in which also plaintiff has a share. The defendants claim the lands as part of their farm, and their disputes led to the institution of a suit under Act IV. of 1840, in which the deputy magistrate was deputed to lay down a boundary line between the two estates, which he did on the 15th April 1851, and his investigation was confirmed by the magistrate on the 25th of the same month, which order was upheld by the session judge, to whom the plaintiff appealed. By the boundary line thus laid down by the deputy magistrate, the plaintiff alleges that he was deprived of 27½ beegahs of the original lands of mouzah Srimuntpoor in Shokallypoor, and of 4112 beegahs out of the 11,688 which had been given to him by orders of the special commissioner, in lieu of the original villages mentioned above, which had diluviated; and he therefore instituted the present suit, to recover possession with mesne profits. A local investigation was made by the moonsiff of Jungypoor in person, who, after tracing the lands measured by the resumption officers, by the help of the chittas from the collector's office, and after examining the deputy collector, under whose superintendence the lands released to and settled with plaintiff had been measured, and other witnesses, both those summoned by the parties, and others whom he found on the spot, determined, for reasons assigned in his proceeding of the 27th June 1856, that the alluvial lands claimed were included in the area released to plaintiff by orders of the special commissioner, and that the original lands belonged to his village of Srimuntpoor. And the principal sudder ameen, considering the investigation correct, and finding nothing valid was urged to impugn its correctness, gave a decree in conformity therewith in favor of the plaintiff.

Two appeals have been preferred from this decision, one on the part of the Messrs. Watson, the other on the part of the Court of Wards in charge of the estate of the minor, a shareholder of talook Bungshybuddunpoor.

The objections urged by both appellants are similar, and their appeals may be disposed of together. These objections are comprised under three heads. *First*, limitation. It is urged that plaintiff must prove his cause of action ; that he must prove dispossession at a certain date and also previous possession within twelve years, and not having been able to do so, his suit, under the recent decision of this Court, dated the 9th July 1858, is barred, and the principal sudder ameen has come to no legal finding on the fact of possession. It is urged, in the *second* place, that, owing to the imperfect and irregular manner in which the local investigation has been conducted by the moonsiff, and the equally imperfect and unsatisfactory evidence given in this case by the deputy collector, and the defective manner in which the chittas and settlement proceedings have been drawn up, coupled with the fact that the land was found at the time of the professional survey to be not in the plaintiff's possession, it has not been proved that the lands in dispute were included in the area released to plaintiff under orders of the special commissioner. Even if this were found to be the case, it gave the plaintiff no right to the lands, for appellants were not parties to the resumption proceedings, and the special commissioner's orders are, consequently, not conclusive against them ; and, therefore, it remained with plaintiff to prove his right. *Thirdly*, the question of title, though the principal point involved in the case, has not been properly determined. The right is abundantly shown to belong to defendants legally and equitably, by the natural position of the lands ; and plaintiff must show his right to overstep the defendants' boundaries, and that it extends over lands formed in front of the original villages belonging to defendants, to which formation the defendants are entitled by law.

With regard to the plea of limitation set forth by the appellant, the Court determined that it was advisable to enter into the merits of the case before any application of the statute of limitations was made to the plaintiff's claim. It was urged, therefore, for the appellant, that the plaintiff had failed to prove his dispossession from these lands, or that they were included in the area released to him by orders of the special commissioner ; that the data on which the local investigation was founded, *viz.* the chittas and settlement proceedings, were so defective, that it was impossible from the former, as shown by the moonsiff's proceedings of the 31st May and 5th June 1852, to trace the lands comprised in the measurement, or to determine from what point that measurement commenced ; and the deputy collector, though speaking generally as to the correctness of the boundary pointed out by plaintiff, was unable to point out in his own map the position of certain villages named by the defendants, or the site of the resumed lands which he had settled. Referring to the boundaries of the resumed and settled lands laid down in the deputy collector's proceeding, the counsel pleaded that these were opposed to the actual position of the villages abutting those lands ; that the boundary of the villages Raneenuggur and Dolubhpoor

was stated to be to the north of the resumed area, but no pains had been taken to determine what was the real boundary of these two villages, and, as they also belonged to the plaintiff, he had no difficulty in extending their area further to the south-east than he was entitled to do, and thereby encroaching on the defendants' lands, under the pretence that they appertained to the four diluviated villages. That this was the case, is evident from a comparison of the *ruqbabundee* of the above two villages compared with the area found by the professional survey, the former showing the extent of these villages to be 1286 beegahs and 3386 beegahs respectively in the year 1201, the latter making them comprise 5882 beegahs and 8951 beegahs. Another statement, made by the appellant, may be mentioned here. He affirms that the original dispute between plaintiff and the Messrs. Watson related to a fishery known as the *Meenkote* of *Tegurria*, which subsequently enlarged itself, till it comprised the area referred to in the deputy magistrate's investigation, and the plaintiff, by a petition of the 9th March 1857, alleged that it was situated within the resumed area of 2881 beegahs settled with him. Now, finding the area in dispute to be much in excess of the resumed area, plaintiff has shifted his ground, and claims the land as part of the area released to him by orders of the special commissioner. As, however, the appellant has not brought forward any proof of this assertion, to which a denial is given by the respondents, we think it unnecessary to take any further notice of it.

In determining this case, we have first to ascertain whether plaintiff has established his averment that the lands in dispute were measured under the special commissioner's instructions of July 1847, and form a portion of the area released to him by orders of that officer. This point has been settled by the local investigation of the moonsiff, whose great difficulty appears to have been to have discovered the exact point from which the resumption officer's measurement commenced; and having ascertained that the *trimohunee* mentioned in those *chittas* corresponded with that actually in existence, a fact apparently much contested at the time, but now admitted by both parties, he was able with some difficulty to trace the lands, and he found that the area then measured comprised the lands now in dispute, and that they were included in that portion which had been given up to the plaintiff under the orders of the special commissioner. Now, the title under which the plaintiff claims these lands is the above-mentioned order of the special commissioner, which assigned possession of them to him in lieu of his permanently settled villages, which had diluviated; and if the appellant contested in the lower court the plaintiff's right to these lands, though included in the resumption officer's measurement, on the plea of their belonging notwithstanding to *Bungshybudunpoor*, it was for him to adduce proof in support of his averment. The plaintiff's title to these lands, resting on the special commissioner's decision, was as valid as his right to the permanently settled villages, in lieu of which they were

assigned to him, and, unless rebutted by the appellant, it must still continue to be held good. The appellant, however, has not urged this plea in the lower court. In his answer he admits the plaintiff's title to the lands released to him by order of the special commissioner to be good, but he contends that the lands in litigation are separate from and not comprised within the released area. On this averment alone he rested his claim in the lower court, and he cannot, in appeal, be allowed to bring forward a new and alternative plea, to the effect that, though the lands be included within the area measured by the resumption officer, and released to the plaintiff, yet his (appellant's) rights are not affected thereby, as he was not a party to the suit. Reference has been made by the counsel for the appellant to the contiguous villages of Ramnuggur and Dolubhpoor belonging to the plaintiff, and it has been suggested that, as their area, according to the survey, greatly exceeds the area recorded in the rughabundee of 1201, plaintiff has included within the boundaries of those villages lands which ought properly to have been assigned to the diluviated villages, and has, consequently, trespassed upon lands which, being an increment to the appellant's estate, having formed in front of his permanently settled villages, legally and equitably belong to the appellant. This plea also is taken now for the first time, and is inconsistent with the appellant's main plea, that the disputed lands were not included in the resumption officer's measurement. It appears that, at the time of the local investigation by the moonsiff, the appellant wished to point out a line further to the north-west as being the boundary laid down by the deputy magistrate, and endeavored to show another spot other than that ultimately fixed on by the moonsiff as the point from which the measurement of the resumption officer commenced; but his pleadings contain no such averment as is now brought forward, that the villages of Ramnuggur and Dolubhpoor comprise lands which should have been assigned to the diluviated villages. We think that no application of the statute of limitations can be made in the present case. The rule laid down in the decision of 9th July 1858 was that if a person, when the period for bringing his action has all but expired, sues to recover possession, he is bound, not only to prove the act of dispossession, but to show that he held previous possession within twelve years of the date of suit. This ruling is not applicable to the present suit, for the plaintiff made no delay in bringing his action to recover possession of the lands which were assigned to him by orders of the special commissioner, and from which he alleged himself to have been dispossessed by the orders of the magistrate in 1851; for we think, from an examination of the record as now laid before us, that the lands now in dispute formed part of the area released to the plaintiff, and of which he was put in possession by the revenue authorities in 1850, in lieu of the diluviated lands of Allatoly and other villages, and continued in possession, till ejected by the magistrate's order, not passed in

conformity with Act IV. of 1840 ; and that his title thereto is good and valid, unless the defendant could show a better title to them. As, however, the defendant, appellant, has admitted the plaintiff's rights to all lands released to him by orders of the special commissioner, and rests his claim to the portion now in litigation, on the sole ground of their not being comprised within the measured area, we cannot permit him, at this stage of the case, to alter his pleadings, and, having failed to substantiate his plea as originally brought, to substitute another, which he failed most unwisely to bring forward in the lower court. We, therefore, dismiss both appeals, with costs.

THE 14TH FEBRUARY 1859.

B. J. COLVIN, Esq., Judge, and C. B. TREVOR, and H. V. BAYLEY, Esqs.,
Officiating Judges.

Case No. 302 of 1858.

Special Appeal from the decision of Mr. E. Radcliffe, Acting Additional Judge of Chittagong, dated 9th December 1857, affirming a decree of Moulvee Ushruddin Alee Khan, Principal Sudder Ameen of that district, dated 31st December 1855.

Debee Doss Dutt (after him Goluckchunder Dutt) and others, (some of the Defendants,) *Appellants,*

versus

Mohunlal Sookul and others, (Plaintiffs,) and Musst. Dinoodeen Seetul and others, (Defendants,) *Respondents.*

Baboo Ramapersad Roy and Kishenkishore Ghose and Moon-shee Ameer Alee, for Appellants.

Baboo Shumbhoonath Pundit and Mr. R. T. Allan, for Mohunlal Sookul, Respondent.

THIS case was admitted to special appeal on the 6th May 1858, under the following certificate recorded by Messrs. J. H. Patton and A. Sconce.

"This suit was instituted to recover possession of certain lands belonging to an estate styled turuf Seetadulput, on the ground that the lands were held on a mortgage by defendants, and that the sum lent by the mortgagees, together with interest, had been realised from the usufruct of the property.

foreclosure, if he desire to preserve his equity of redemption, to pay any sum claimed by the mortgagee as still due within the year of grace. If he fail to do so, he acts *at his own risk*, and if, eventually, after a suit brought by him to redeem, one pie is found to have been due at the expiry of the year of grace, his right to redeem must be declared to have lapsed.

Held also, that in a mortgage of this nature, on a suit for redemption by the mortgagor, when the mortgagee has filed his accounts of collections, with a view of ascertaining whether any equity be outstanding in the mortgage, or not, the account must be made up to the date of the expiry of the year of grace, and not to any subsequent period.

Held, that in an usufructuary conditional sale, that is, a conditional sale with possession and enjoyment of the rent and profit, granted to the mortgagee, it is incumbent on the mortgagor, after notice of

" On the part of the defendants it is pleaded, that the original transaction by which they acquired the land was a conditional sale, and that notice of foreclosure having been issued, on their application, on the 24th September 1850, plaintiffs, failing to redeem within a year of notice, could not, by this suit, recover the land claimed.

" Both the lower courts have held defendants, petitioners, to have realised from the usufruct of the land more than their debt amounted to, and, accordingly, possession has been awarded to them, plaintiffs.

" Petitioners take several grounds of special appeal : *first*, it is contended that, as plaintiffs, within one year from the issue of notice, did not discharge the debt due, they lost their right of redemption, and, *secondly*, that the lower courts have erred in extending the account of collections beyond the year of notice down to the date of decision.

" With respect to the first point the judge remarks as follows. ' As it appears from the above that the terms of the ikrar had been vitiated by the defendants, and that between 1830 and 1850 they took no steps to foreclose, and that when they did, on the 24th September 1850, pray for the same, their case was struck off the file on the 4th January 1851, the year of grace not having expired, I am of opinion that the defendants had no right to foreclosure.'

" In some respects the judge appears to be under some misapprehension as to the legal rights and acts of the petitioners, the mortgagees. Their petition for serving notice of foreclosure was apparently removed from the file in ordinary course of business after the notice had been issued, and so far the removal from the file could not affect the petitioners' rights. Again, we would observe that mere delay in applying for foreclosure does not affect the right to foreclose. Further, in what respect the terms of the original conditional mortgage had been vitiated by the defendants, is not clear from the language used by the judge. Perhaps it may be, as explained by Baboo Shumbhoonath Pundit, that allusion is made to the terms of a decree passed in 1831, whereby possession of a principal portion of the land mortgaged, which had been withheld from the mortgagees, had been awarded to them. It is said that the terms of the decree of 1831 varied the transaction from a conditional mortgage to a simple mortgage. We admit the special appeal to try the above two points."

JUDGMENT.

It appears that, on the 12th Falgoon 1189 M., or 1828 A. D., Lala Telookchunder executed, in favor of Sootoonarain Dutt, Ramdas Dutt, and others, ancestors of the plaintiffs, a deed, to the following effect. " I, Lala Telookchunder, resident in Kunchunnuggur, do hereby execute this deed of conveyance, on receipt of consideration money, as follows :—That the turuf known by the name of

Seetadulput is my proprietary zemindaree, containing an area of 144*d.*-14*k.*-18*g.*-3*c.*, of which 29*d.*-3*k.*-16*g.*-1*c.* are waste, and 115*d.*-11*k.*-10*c.* are cultivated, and bearing an annual jumma of rs. 1267-1*a.*-17*g.*; that I have held long possession of the lands of the aforesaid property, paying the public revenue and enjoying and appropriating the profits thereof; that, being unable to pay the Government revenue any longer, I, of my own free will and accord, and in possession of my sound senses, hereby sell and transfer to you the whole 16 annas of my said zemindaree free from all encumbrance (with the exception of the villages of Jufferabad and Charbusbad,) and containing an area of 111*d.*-9*k.*-9½*g.*, of which 21*d.*-8*k.*-4*g.* are waste, and the residue 90*d.*-4*k.*-5*g.*-2*c.* culturable, and bearing a sudder jumma of rs. 997-5*a.*-7½*g.*, on receipt of rs. 4900, the fair value thereof; that you are hereby entitled to dispose of and alienate by sale and gift the whole estate, with the exception aforesaid; that you, holding and possessing the cultivated and uncultivated lands, tanks, &c., and paying the revenue to Government, are to enjoy and appropriate the profits, peacefully and without molestation, from generation to generation; that when the survey and measurement of the aforesaid estate shall be made, you shall cause your own names to be registered as proprietors in conjunction with mine in the collectorate; that neither I, nor my sons, nor grandsons, shall ever claim the aforesaid zemindaree and the lands appertaining thereto. On these terms I have executed this conveyance of the aforesaid estate, free of all encumbrance, on receipt of consideration."

On the same day Sootoonarain Dutt and others executed, in favor of Lala Telookchunder, an *ikrarnamah*, or agreement, in which, after reciting the sale of Seetadulput to them, they, on their part, covenant, "that if the principal, as per bill of sale, be paid at the end of the period of seven years, they will relinquish the lands, together with the bill of sale, receipt for the money, dakhilas of the collectorate, documents of settlement and possession. If, on the contrary, the principal sum be not repaid within the term stipulated, then the *ikrar* is to be null and void, and the bill of sale is to be absolute and conclusive. If, within the term stipulated, the payment of the public revenue is withheld, so that the estate is sold by auction, then they bind themselves to pay the price which the lands in question would fetch at a private sale."

After the execution of these deeds, which were both duly registered, difficulties were placed in the way of the mortgagees' obtaining possession. They, consequently, in 1830, instituted a suit for the possession of 111*d.*-9*k.*-9*g.*-2*c.*, stating that, in furtherance of the mortgage, they were about taking possession of the estate of Seetadulput, when, by the acts of the mortgagor, they were prevented entering into possession, and reciting other facts which it is unnecessary to detail. On the 30th September 1831, or 18th Assar 1193 M.,

the judge of Chittagong inspected the document above set forth, and, finding that it was stipulated in the deed executed by the mortgagor, Telookchunder, that if, within seven years, the principal were paid, the mortgagees, the plaintiffs in that suit, should restore the lands, and that the sale should be absolute were it not paid within that time, he declared that the plaintiffs were entitled to possession of the whole property, until the period stipulated, or until the realisation of the money, with interest, from the proceeds of the estate; and as plaintiffs had only been able to obtain possession of 7d.-8k.-6g.-2c., he decreed to them possession of the remainder of the estate mortgaged, with costs of suit.

It appears that one Augustin Pinheiro and Buddinath Bajpye, who had obtained a decree against the mortgagor, sold his rights and interests in the estate of Seetadulput, which were foreclosed by the plaintiffs in the present suit, out of which this special appeal has arisen, on the 7th April 1851. As representatives, by purchase, of the mortgagor, they, therefore, sued for the redemption and for possession of the estate, inasmuch as the mortgagees have collected in excess of the sum due to them with interest.

The court of first instance rejected the accounts filed by the defendants; and, after a careful calculation of the profits, which have been reckoned on the amount of the arable land mortgaged, at the rates proved current by various summary suits and evidence of witnesses, it came to the conclusion that the mortgagees had collected a sum in excess of that due to them, after deducting the original loan and the interest that has accrued thereon. The principal sudder ameen, consequently, gave plaintiffs a decree.

On appeal, the judge was of opinion, from the papers filed by the plaintiffs, that rs. 2 per kanee is a fair rate upon which to base the calculation; and that, although the defendants assert that a balance of principal, rs. 4900 Sicca, and rs. 7074 Co. interest, is still outstanding, still they produce no evidence on which reliance can be placed; and as, from the calculation as per record, it would appear that, up to 1217 M., the defendants had collected rs. 1960 Co. more than they were entitled to, the plaintiffs, respondents, were entitled to possession. He, consequently, dismissed the appeal, confirming the order of the court below.

Against this decision the defendants, appellants, appealed specially, and their appeal was admitted to try two points: *first*, inasmuch as plaintiffs, within one year from the issue of the notice, did not discharge the debt, did they not, by such failure, lose their right to redeem? and, *secondly*, whether the lower courts have erred in extending the account of collections beyond the year of notice down to the date of decision.

There can be no doubt, as stated in the remarks of the admitting judges, that the court below has erred in ruling that the defendants have no right to foreclose, inasmuch as their case was

struck off the file on the 4th January 1851, previous to the expiry of the year of grace. Special appellants issued notice of foreclosure on the 24th September 1850, and after every thing necessary to be done by them had been done, the matter was struck off the file on the 4th January 1851. This formal act has no effect upon the rights of the mortgagor and mortgagees. The mortgagor, or his representative by purchase, must, within one year from the 24th September 1850, have paid every pice due under the mortgage, or on that date the sale became absolute ; and, looking to the second point on which the special appeal has been admitted, we would observe that the account must be made up to that date only, and not to any subsequent period.*

With a view, however, of altogether getting rid of the effect of the notice and non-payment under it, it has been urged that the decision of the judge of Chittagong, dated the 30th September 1831 A. D., converted a transaction which was in the nature of an usufructuary conditional sale into a pure usufructuary mortgage.

We have attentively perused that decision, and we find that there is not the slightest ground for this allegation, which is now mentioned for the first time. The plaintiff in that case, the defendant in this, sued for possession of the estate which had been mortgaged to him, to which he was, under the terms of the deed, entitled. The court accepted the interpretation for which the plaintiff contended, and declared him entitled to possession during the remainder of the term mentioned in the mortgage-deed, or until the debt be paid with interest.

To this extent the court acted, but as to the court's converting a transaction of one nature into one of another, it neither had the power to do, nor did it in fact so act.

It remains then for us to enquire whether, on the expiry of the year of grace, any sum remained due to the mortgagees. It is of course quite competent to the mortgagor, or his representative, in a mortgage like that before us, to omit to make any payment during the year of grace, but this omission is at his own risk, and if one pice be on that date found to be due, the mortgage has become irredeemably foreclosed, and the conditional sale has become absolute.

Now, looking to the accounts which have been accepted by the courts below, and which we cannot now question in special appeal, we find that, on the last day of the year of grace, a considerable sum, viz. rs. 2419, was due to the mortgagees. Such being the case, we hold that the plaintiffs have lost their equity of redemption, and that the special appeal must be decreed, and the decisions of the lower courts reversed, with costs.

* See Macpherson on Mortgages, pp. 218 and 214.

THE 14TH FEBRUARY 1859.

B. J. COLVIN, Esq., Judge, and C. B. TREVOR and G. LOCH, Esqs.,
Officiating Judges.

Special Appeals from the decisions of Mr. E. Jenkins, Officiating Additional Judge of Sarun, dated 5th November 1857, affirming decrees of Mirza Mahomed Sadeeq Khan, Principal Sudder Ameen of that district, dated 25th March 1857.

Case No. 304 of 1858.

Nuseeb Lall, (Plaintiff,) *Appellant,*
versus

Rampersad Narain Singh and others, (Defendants,) *Respondents.*
Baboo Shumbhoonath Pundit and Moulvee Murhumut Hossein, for Appellant.
Moulvee Aftabooddeen Mahomed, for Reet Lall, Respondent.
Baboo Kishensukha Mookerjee and Kaleeprosunno Dutt, for Jea Lall and Choonee Lall Sahoo, Respondents.

Case No. 303 of 1858.

Nuseeb Lall, (Defendant,) *Appellant,*
versus

Reet Lall and others, (Plaintiffs,) *Respondents.*
Baboo Shumbhoonath Pundit and Moulvee Murhumut Hossein, for Appellant.
Baboo Ramgopal Ghose and Unnodapersad Banerjee, for Reet Lall and Motee Raj, Respondents.

Case remanded, as the lower courts have disposed of the suits on an erroneous principle. The proper course to be taken in deciding the cases pointed out.

THESE cases were admitted to special appeal on the 7th May 1858, under the following certificate recorded by Messrs. A. Sconce and J. S. Torrens.

"Two several suits are now brought before us. In the one case, petitioner sued, after foreclosure, to be put in possession of four villages, which Rampersad Narain Singh, Tek Narain Singh, Musst. Soobodh Kooar, and Dwarka Lall had conditionally sold to him; and

A seeks to obtain possession of four villages, conditionally sold to him by four separate parties, B, C, D and E, after due notice of foreclosure. B had previously pledged his rights in one village to R, as security for a loan. R sued and got an *ex-parte* decree, under which, in execution, he sold the rights of B, and purchased them himself, and instituted a suit for possession, making A, as well as B, parties to the suit. The two suits were disposed of together, and the lower courts held that, as R had obtained a decree against B, his right could not be questioned, though A pleaded that the decree was collusive. They therefore gave possession to R, and dismissed the claim of A, on the ground that his mortgage was collusive.

Held, that, as the conditional sale pleaded by A was last in date, the lower courts should have first inquired into its *bona fides*, irrespective of the decree pleaded by R. Should it be found to be invalid, the whole claim of A would be rejected. If proved to be valid, A might then question the validity of the *ex-parte* decree held by R; and if that should prove to be a transaction in good faith, A should be put in possession of the property pledged by the other mortgagors.

in the second, Reet Lall and Motee Rae sued to be put in possession of a half share of Rampoor, one of those four villages, having purchased the same at a sale made in execution of a decree held by them.

"It appears that Dwarka Lall and another were the debtors of Reet Lall and Motee Rae; and that, having mortgaged half of the village Rampoor as security for their debt, the execution sale was made in fulfilment of that engagement.

"The zillah judge has awarded possession to Reet Lall and Motee Rae for half of Rampoor, and has wholly dismissed the suit of petitioner for the four villages.

"The deed held by Reet Lall and Motee Rae was dated in Bhadoor 1259 (1852), and their decree for the debt due was pronounced on the 10th March 1854. Before the judge, however, petitioner in appeal objected that the bond set up by the plaintiffs, Reet Lall and Motee Rae, was fraudulent; and that the lien so acquired could not prejudice their title by conditional mortgage to the same village. This issue the judge declined to try, holding the decree of the 10th March 1854 to be binding on him; and without entering into the question of fraud as respects Reet Lall's lien, he held petitioner's deed to be collusive, as petitioner happened to be a mookhtear of one of the parties (he seems to mean) to the deed given to Reet Lall.

"The first ground of special appeal is, that the decree of 10th March 1854, to which petitioner was no party, could not bind him, and that the ground asserted by him should be tried.

"And, secondly, it is urged that, supposing his claim to the possession of Rampoor to be thrown out, he was still entitled to a decree for possession of the other three villages, under his foreclosed mortgage, to which no opposition had been made.

"We admit the special appeal to try these points."

JUDGMENT.

The petitioner, Nuseeb Lall, alleges that Dwarka Lall, Musst. Soobodh Kooar, Rampersad Narain, and Tek Narain conditionally sold to him their property in certain villages, on the 2nd June 1853. The property thus sold was as follows: a 5-anna 4-pie share in mouzahs Rampoor, Saudh, Ladpoor and Etaye, belonging to Dwarka Lall; a 2-anna 8-pie share of mouzah Rampoor, and a 1-anna 4-pie share in mouzahs Saudh and Ladpoor, belonging to Musst. Soobodh Kooar; and a 2-anna 8-pie share of mouzah Etaye, belonging to Rampersad Narain and Tek Narain. On the 14th February 1854 he served notice of foreclosure; and the year of grace having expired on the 22nd February 1855, he brought a suit to obtain possession on the 30th March 1855.

Previous to this Dwarka Lall had mortgaged his 5-anna 4-pie share of mouzah Rampoor to Jhensoo Roy, on the 1st April 1853; and when that person issued notice of foreclosure, the petitioner, Nuseeb Lall, to protect his own interests, deposited rs. 572-13, the amount due by Dwarka Lall to Jhensoo Roy, on the 3rd June 1854.

It appears, further, that Dwarka Lall had borrowed money from Reet Lall, and had, on 22nd Bhadoor 1259 F. S., corresponding with 2nd September 1851, pledged his rights in mouzah Rampoor as security for the debt. Reet Lall brought a suit for the amount, and obtained an *ex-parte* decree, and in execution, sold the property pledged, on the 3rd July 1854, purchasing it himself, and then instituted a suit for possession on the 13th March 1855, making the petitioner and others parties to the suit.

The two suits, *viz.* that instituted by Nuseeb Lall for possession of his mortgagors' shares in the villages of Rampoor, &c., and that instituted by Reet Lall for possession of the share of Dwarka Lall, in mouzah Rampoor, were tried together. A decree was given for the latter, and the suit of the former was dismissed, his deed of conditional sale being declared collusive. These decisions of the first court were confirmed by the judge in appeal.

It is urged by the special appellant that, as Reet Lall made him a party to his action, and sued not only to obtain possession, but also to set aside the deeds of conditional sale executed by Dwarka Lall in favor of the petitioner and Jhensoo Roy, the special appellant, in his suit, which was subsequently instituted and comprised the property for which Reet Lall had obtained an *ex-parte* decree, could not avoid making Reet Lall a party; and as in his plaint, as also in his answer in Reet Lall's case, he declared the *ex-parte* decree obtained by that individual to be collusive, the judge should have determined this point, which was at issue between them. Instead of doing this, the lower courts held that, owing to the decree gained by Reet Lall, they were prevented looking into his case at all, and concluding from that decree that his claim was valid, they pronounced the conditional sale to the special appellant to be collusive. The proper course to have been pursued was, to determine, in the first place, and irrespective of Reet Lall's decree, whether the special appellant's deed was collusive or otherwise, as it was the latest in date; and, having come to a determination, should that have been in favor of the deed held by the special appellant, to have proceeded to examine into the allegations made by the special appellant, that the *ex-parte* decree obtained by Reet Lall was collusive. The special appellant then proceeded to point out the proofs of the *bona fides* of his sale, among which he referred to a petition filed by the mortgagors in the judge's court, in June 1853, and his having paid the amount due to Jhensoo Roy, when that party had issued notice of foreclosure against Dwarka Lall; and added that, admitting the

claim of Reet Lall to, be good against the share of Dwarka Lall in mouzah Rampoor, this should not bar the special appellant's right to obtain possession of the rest of the property pledged by Dwarka Lall and other parties, to which Reet Lall had laid no claim, and which right the mortgagors did not dispute, but the decision of the lower courts, resting exclusively on the *ex-parte* decree obtained by Reet Lall, had, by declaring special appellant's deed collusive, deprived him of his right to that property.

We think that the lower courts have disposed of these cases on an erroneous principle, and have come to a wrong conclusion as to the effect of the *ex-parte* decree obtained by Reet Lall. The sale to Nuseeb Lall has, apparently, been declared collusive, because the decree of Reet Lall has been accepted as good ; for no other reason is assigned for this conclusion. We think that, as the deed held by Nuseeb Lall was of subsequent date, the course which should have been pursued was to have determined, first of all, and irrespective of Reet Lall's title, whether the document, on which the special appellant rests his claim, was executed in good faith or otherwise. If proved to be collusive, his claim would at once be disposed of ; if proved to be good, we think he would have a right to question the validity of Reet Lall's *ex-parte* decree, and adduce evidence to show it to be collusive and liable to be set aside. If Reet Lall's decree be also found to be a transaction in good faith, the claim of Nuseeb Lall to the property of the other mortgagors remains to be enforced. We, therefore, remand the case to the judge, who will send the record to the lower court, to be disposed of with reference to the above remarks. Before us one Choonee Lall brings forward a claim in opposition to Nuseeb Lall, as being a mortgagee in possession of the property in litigation ; but, though his name is entered as a defendant in the proceedings, we cannot gather from the decision what is the nature of the claim. The lower court, in disposing of the cases, should set forth clearly what are the rights of this last-mentioned party.

THE 14TH FEBRUARY 1859.

B. J. COLVIN, Esq., Judge, and C. B. TREVOR and G. LOCH, Esqs.,
Officiating Judges.

Case No. 451 of 1858.

Special Appeal from the decision of Baboo Taruknath Bidyasagur, Principal Sudder Ameen of Cuttack, dated 19th January 1858, affirming a decree of Baboo Gourbullubh Ghose, Moonsiff of Pooree, dated 18th August 1857.

Mohunt Gobind Ramanooj Dass, (Plaintiff,) *Appellant,*
versus

Ajaiblal Bhukt and another, (Defendants,) *Respondents.*

Baboo Baneymadhub Banerjee, for Appellant, Ex-parte.

Held by a majority of the Court, that the terms of the pottah merely provided for the payment of a certain rent as a yearly tenancy, but did not protect the tenant from enhancement; and that, if he wished to protect himself from enhancement, he should have taken care to have the lease so worded as to guard him from any demand for enhanced rent.

THIS case was admitted to special appeal on the 24th July 1858, under the following certificate recorded by Messrs. C. B. Trevor and H. V. Bayley.

"Plaintiff sued defendants for enhanced rent.

"Defendant put forward a pottah, alleging that, by virtue of its terms, he was not subject to any increase.

"The moonsiff dismissed the plaintiff's claim, and the principal sudder ameen upheld the moonsiff's order. The reason given by the principal sudder ameen is, that the terms in the original Ooriah pottah, *tahi ba tahi*, secure to defendant one and the same jumma, year by year, at least for his life.

"The plaintiff appeals specially, urging that the judge has misconstrued the terms cited, and that their import is *kist ba kist*; that the pottah is an ordinary one, binding the defendant to pay what he may have to pay as each instalment fell due; but that these terms do not bar a suit for enhancement or afford a mokur-rurree right to defendant even for his life.

"We admit the special appeal to try this point."

JUDGMENT.

Messrs. C. B. Trevor and G. Loch.—"With reference to the particular point on which the special appeal was admitted, we consider that the words, *tahi ba tahi*, are equivalent to the expression *kist ba kist*, used in Bengalee documents relating to the payment of rent; nor do we find that the principal sudder ameen has given any other than this construction to them. He holds that, from the terms of the pottah under which the defendant was bound to pay an annual rent of rs. 12, *tahi ba tahi*, he was entitled to hold the land at that rate as long as he retained possession, and that his rent was not subject to enhancement. The grounds urged by the counsel for the special appellant are, that Mohunt Damoodur Dass, from whom the defendant received the pottah, was only a manager of an endowment, the lands of which appertained to the temple of Juggurnath;

that he, consequently, could not grant a lease for a longer period than his own life; and that the terms of the pottah do not provide for the payment of a rent fixed in perpetuity.

"On reference to the pottah, we find that it provides for the annual payment of rs. 12, and is only a yearly tenancy, but it does not limit the right of the landholder to enhance the rent. The tenant, if he wished to protect himself from enhancement, should have taken care that the lease was so worded as to guard him from any demand for increased rent. With this interpretation of the document, we remand the case to the principal sudder ameen for disposal, with reference to the above remarks."

Mr. B. J. Colvin.—"I dissent from my colleagues in this case. The pottah was given to Ajaiblal, on the understanding that, as long as he retained the ground, he was to pay rs. 12 yearly. I deduce this from the condition on the pottah that he was to pay the amount, whether he built a house upon the ground or not. Ajaiblal is still alive, and, therefore, in his life-time the implied condition of the pottah should not be infringed. I would dismiss this appeal."

THE 15TH FEBRUARY 1859.

H. T. RAIKES and J. H. PATTON, ESQs., Judges, and G. LOCH, Esq.,
Officiating Judge.

Case No. 301 of 1857.

Regular Appeal from the decision of Baboo Panchannun Banerjee, Principal Sudder Ameen of Zillah Rajshahye, dated 23rd December 1856.

Hurreenarain Gossain, (Defendant,) *Appellant*,
versus

Doorgasoonderee Debea, widow of Lokenath Moitro, deceased,
(Plaintiff,) *Respondent*.

Baboos Aushootosh Chatterjee and Unookoolchunder Mookerjee,
for Appellant.

Moonshee Ameer Alee and Biboo Bungsheebuddun Mitter, for
Respondent.

Suit laid at Company's Rupees 7848-12.

THE defendant in this cause leased to Lokenath Moitro, husband of the plaintiff, the farm of Dehee Gosainbaree for six years, viz. from 1259 to 1264 B. S., at an annual rent of rs. 7007, the lessee pledging his share of the zemindaree of Lushkurpoor in

Plaintiff being recognised by the civil court as her deceased husband's heir, under will, had a right to sue.

In the lease to her husband there was no express stipulation about its lapse or its continuance on his death. But his widow's right to hold during the remainder of the lease was valid by general custom, so long as she paid the rent faithfully, the more so as property had been pledged as security for the observance of all conditions of the lease. Possession and meane profits during dispossession awarded.

security for the due fulfilment of the conditions of the lease. Lokenath demised in 1261 B. S., before expiry of the farming lease ; and the defendant, ousting the plaintiff, took the farm under *khas* management, asserting that Lokenath's rights in regard to it died with him. The plaintiff, therefore, brought this action in right of succession to her deceased husband, and, as his representative, to recover possession of the farm for the remainder of the lease, and to get meane profits during the period of dispossession.

The defendant resisted her claim, on the allegation that the terms of the lease did not make it hereditary, and that, consequently, plaintiff could not succeed to it in right of her deceased husband ; that she was one of three wives who survived Lokenath Moitro, and possessed no exclusive privileges under the will to entitle her to sue irrespectively of them ; and that she had executed no engagement for renewal of the farm after the demise of her husband.

The principal sudder ameen decreed for the plaintiff, holding her entitled to possession of the farm during the remainder of the lease, and to the wasilat she claimed.

The defendant appeals against the decision, pleading that the lease was not hereditary in its terms, and could not therefore devolve as of right upon the heirs of the lessee ; and that the action could not be brought by the plaintiff alone, as Lokenath left two other wives besides her ; and executors were appointed by the will under which the plaintiff asserts her rights.

JUDGMENT.

In this case defendant, appellant, admits that he gave the farm in suit to the husband of the plaintiff for the term specified, who pledged certain landed property as security for the payment of the rents. It is also admitted by the defendant, that, when the plaintiff brought this suit, he (defendant) held his lien over the property alluded to. It is not denied that plaintiff's husband died during the pendency of the lease, and that on his demise defendant evicted plaintiff from the farm. The terms of the contract, it is true, do not in words set forth that, in the event of the lapse of life of the original lessee, it shall devolve upon his survivor and representative ; but such express conditions in the deed are, in our opinion, unnecessary to secure to the plaintiff the right she claims. A limited right of the nature asserted by her, we hold to be heritable by general custom, unless otherwise restricted by the express language of the deed ; and, in the present instance, its continuance appears to be guaranteed by the pledge of property as security for the payment of rent during the whole period of the lease. So long as that rent is paid, the contract must subsist. The objection taken to the institution of this suit by the plaintiff we consider to be overruled, by the fact of her having been authoritatively recognised,

as the representative of her husband under his will, by a proceeding of the civil court of Rajshahye, dated the 9th April 1855, filed with the record. Holding then that the plaintiff is entitled to the same rights and privileges in the farm for the remainder of the lease as those enjoyed by her husband prior to his decease, and that she is his legal heir and representative, we concur with the principal sudder ameen in the propriety of his decision, adjudging her possession of the farm for the residue of the lease and mesne profits during the period of dispossession. We, therefore, affirm his judgment, and reject the appeal, with costs upon the appellant.

THE 15TH FEBRUARY 1859.

C. B. TREVOR and H. V. BAYLEY, Esqs., Officiating Judges.

Petition No. 1496 of 1858.

Application for Special Appeal from the decision of Mr. R. J. Scott, Judge of City Patna, dated 11th May 1858, reversing that of Moulvee Mahomed Haneef Khan, Principal Sudder Ameen of that district, dated 4th March 1857, in the case of

Musst. Beebee Nyamut and others, *Plaintiffs*, Petitioners,
versus

Fuzl Hossein and others, *Defendants*.

Moonshee Ameer Alee, for Petitioners.

Baboo Ramapersad Roy and Kishenkishore Ghose, for the Opposite Party.

It is hereby certified that the said application is granted on the following grounds.

One Beebee Nyamut, the wife of Gholam Ghous, and others, his heirs, sued for possession of 8½ annas of mouzah Anundpore Surrandah, for the registration of their names as proprietors, and for the erasure of the name of Khadim Alee, and for the cancellation of a lease granted by this party.

They allege, amongst other things, that mouzah Anundpore was sold for arrears of Government revenue, and bought by their ancestor, in the name of Khadim Alee, on the 11th November 1839; that

Held, that however objectionable the system of benames transactions may be in theory, it is legal and in common use. It was consequently incumbent on the judge to recognise it, and to follow those rules in dis-

vering the merits of the particular transactions before him, which have been prescribed by the precedents of the Privy Council and of this Court.

Held, also, that in the present case, in which the plaintiffs, special appellants, filed the original deed of sale, the receipt for the purchase money, and various other documents, and in which they allege that, though the purchase was made in the name of Khadim Alee, the real purchaser was their ancestor, Gholam Ghous, and that Khadim Alee was a mere trustee for Gholam Ghous, in whom rested the beneficial ownership, it was incumbent on plaintiffs to prove the payment of the purchase money by them, and if they did so, any subsequent acts done in the name of the nominal owner would be explained by reference to the original transaction; whereas, if they cannot prove that payment, their case must necessarily fail.

Case remitted for re-investigation by the judge, as suggested in the remarks made by the Court.

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their ancestor alienated various shares of the property to enable him to pay the purchase money in the name of Khadim Alee; that, in short, in all legal instruments and transactions regarding the property, the name of Khadim Alee was used; that, subsequently, Gholam Ghous caused Khadim Alee to draw up a deed of sale in his favor for the property; that the deed was registered on the 28th February 1850, but Gholam Ghous dying about that time, Khadim Alee refused to give up the deed, and, collecting a body of armed men, possessed himself of the property, and, the ticcadar colluding with him, ousted the plaintiffs.

The defendants pleaded that Khadim Alee was the real purchaser; that he was always in possession as such; that the story of forcible ouster is false; that he had agreed, in 1850, to convey the property by sale to Gholam Ghous, but that, as the consideration money was not paid, the transaction fell, though the deed remained in his possession.

The principal sudder ameen, after attentively perusing the papers filed by the plaintiffs, *viz.* the original bynamah of the collector, the receipt of the collector for the purchase money, the kuboolyuts of farmers and receipts for revenue, and also the proof filed by defendants, was of opinion that Gholam Ghous was the rightful owner of the property, and gave plaintiffs a decree.

On appeal the judge remarks as follows. "It appears to me that this decree strikes a fatal blow at the validity of all titles to landed property, and sanctions a system by which the most binding and obligatory of legal instruments can be nullified, by a party bringing witnesses to swear that, at the time of their execution, there was an understanding that they were not to be binding, or to hold the signification ordinarily attached to them. Thus, after the estate had been held for many years by Khadim Alee, Gholam Ghous asserts that, to get it in his name, he caused Khadim Alee to execute a deed of sale in his favor, covenanting to sell it to him and give him possession for rs. 8000: at the same time he pleads that this deed is to be considered merely as an *ikrarnamah*, as he, Gholam Ghous, was in possession before, and he would not have had to pay rs. 8000. I think this deed must be considered as telling against plaintiffs' claim. Again, though Khadim Alee is charged with having gone with armed men and plundered zemindaree papers, with a view of proving actual possession, no information of the act was given at the *thannah*." The judge reversed the order of the lower court, with costs.

Plaintiffs now appeal specially, urging that the decision of the judge is defective; that he should have looked at all their evidence, both documentary and oral, showing that they paid the purchase money of the estate and the revenue since; and that it had always been in their possession; and not, on a theoretical objection to

benamee transactions, have dismissed, without full enquiry, their claim.

We think that there is much weight in the objections raised by special appellants. However objectionable the system of *benamee* transactions may be, that is, the system of representing acts to be done by one party which are actually done by another, that system is legal and in common use. It must, consequently, be recognised by the courts, and those rules followed in discovering the merits of the transactions which have been prescribed by the precedents of the Privy Council and this Court.

In the present case, it is alleged by plaintiffs that, though the purchase was made in the name of Khadim Aleo, the real purchaser was Gholam Ghous, that is, that Khadim Aleo was a mere trustee for Gholam Ghous, in whom rested beneficial ownership. In order to prove this, it is necessary for the parties alleging it to prove that the purchase money was paid by them. If they do this, the subsequent acts done in the name of the nominal owner are all explained by reference to the original transaction, whereas, if they do not prove that fact, the others must be interpreted unfavorably to the parties failing to substantiate the allegation on which the suit rests.

It appears that, in the present case, the plaintiffs, special appellants, filed the original deed of sale, the receipt for the purchase money, and various other documents, to prove that the purchase money came from their ancestor, Gholam Ghous. But regarding these the decision of the judge is altogether silent; and this silence is a defect, which requires to be remedied by a re-investigation. We, therefore, remit the case to the judge, with instructions that he re-enquire into plaintiffs' appeal, keeping in mind the remarks above suggested, and giving due and proper attention to all the documentary and oral evidence filed by both the parties before him, and pass eventually such a decision as the circumstances may seem to him to require.

THE 15TH FEBRUARY 1859.

H. T. RAIKES and B. J. COLVIN, Esqs., Judges, and G. LOCH, Esq.,
Officiating Judge.

Case No. 277 of 1857.

Regular Appeal from the decision of Moulvee Itrut Hossein Khan, Principal Sudder Ameen of Rungpore, dated 31st December 1856.

Deendyal Chatterjee, (Defendant,) *Appellant,*
versus

Maharajah Azeemoodowla Bunwaree Kishore and others, (Plaintiffs,
Respondents.

Baboos Ramapersad Roy and Shumbhoonath Pundit, for
Appellant.

Baboos Jugdanund Mookerjee, Kaleeprosunno Dutt, and Aushoo-
tosh Chatterjee, for Respondents.

Suit laid at Company's Rupees 9659-2-8.

Where one of several joint sharers granted a putnee, whether benamsee, for his own benefit only, or as for all sharers, to defendants, and kept him out of possession, and collected the rents till the criminal court put him in possession, the defendants were entitled to have an account of the collections before being sued by the co-sharers for rents.

THE only point on which this appeal is preferred is, that the lower court has omitted to consider, whether the defendant, appellant, is not entitled to have an account from the plaintiffs of the collections made by one of them, who, according to the finding of the lower court, resisted and prevented defendant from taking possession of his putnee from Bysakh to Aughrun of the year 1254 B. S., the year for which rent is claimed in this suit, and for which rent has been decreed to the plaintiffs by the court below, with the exception of that period during which defendant was not put in possession.

Defendant's right to have this account of collections considered by the court in this suit is resisted by the plaintiffs, respondents, on the ground that, although all the three brothers, as members of a joint undivided family, granted the putnee, and sued together in his suit for the entire rents of 1254 B. S., yet only one of them, the eldest, resisted defendant's possession during the first eight months of 1254 B. S. (or until the order of the criminal courts placed him in possession), on the ground that the putnee, though ostensibly granted in defendant's name, was a benamsee transaction, for the benefit of the elder brother only, and without the cognizance or knowledge of the younger brothers, and was, in fact, a deceit practised upon them by their elder brother; and, consequently, his opposition cannot be taken advantage of in the present suit to reduce the rent payable by the putneedar; and they, therefore, dispute the competency of the court to enter upon the question mooted by the defendant, appellant, in his appeal.

We are, however, of opinion, that, as the respondents do not question the correctness of the lower court's finding, on the fact of

defendant's having taken a putnee lease from the respondents, from Bysakh 1254 B. S., or that he was wrongfully kept out of possession by one of them, until restored to possession on the 2nd of Aughrun of that year ; and as a distinct liability against one of them, on the ground of the putnee being a benamee transaction, for benefit of the elder brother alone, can only arise on the presumption that fraud and deceit were practised by him against his two brothers ; and as no such fraudulent motive has been assigned, for defendant's dis-possession, by the lower court, we think defendant is entitled to have the account of the collections, as pleaded by him, taken into consideration in this suit, and to have his own liability for the rent of 1254 B. S. restricted to any amount remaining, after giving him credit for all sums received by the elder brother, from Bysakh to Aughrun of that year, and that, moreover, as the acts of the plaintiffs have given rise to this dispute in the settlement of the accounts, no interest should be allowed in computing any amount which may be due to the plaintiffs after such adjustment.

We, therefore, return this case to the lower court, that an enquiry may be made as to the amount received by plaintiffs' elder brother, from Bysakh to Aughrun of 1254 B. S., and whether, after deducting the putnee rents of that period, a surplus remains, sufficient for the discharge of the remainder of the rent for that year, or for any portion of it ; and that plaintiffs' claim be either dismissed or reduced in proportion to the out-turn.

THE 15TH FEBRUARY 1859.

H. T. RAIKES and J. H. PATTON, ESQS., Judges, and G. LOCH, ESQ.,
Officiating Judge.

Case No. 577 of 1856.

*Regular Appeal from the decision of Baboo Ramlochan Ghose,
Principal Sudder Ameen of Nuddea, dated 29th July 1856.*

Brindabunchunder Sircar Chowdree and Grishchunder Sircar Chowdree, (two of the Defendants,) *Appellants,*
versus

Mr. Edward Roberts, Manager on behalf of the Bengal Indigo Company, (Plaintiff,) and Rajah Gungaishchunder Roy, (Defendant,) *Respondents.*

Baboos Kishenkishore Ghose and Bungsheebuddun Mitter, for Appellants.

Baboo Ramapersad Roy and Mr. R. T. Allan, for Respondents.

Suit laid at Company's Rupees 5011-3.

Plaintiffsought to obtain possession under a deed of conditional sale from Rajah Gungaishchunder, after due notice of foreclosure. Defendants, appellants, are in possession as auction purchasers, and plead that the property having been mortgaged to them as security for the payment of the principal sum lent by them to the rajah, he was incompetent to mortgage the property to another party till the whole of their claim was liquidated; and that having obtained a decree for the interest due on their debts, they had sold the property in execution and purchased it. They further pleaded collusion between plaintiff and the rajah to deprive them of possession.

ON 11th Poos 1249 B. S., or the 25th December 1842, Rajah Gungaishchunder Roy executed a bond for rs. 18,250, alleged to have been received by him from Mr. Harris, proprietor of the Khalbolya concern. By the terms of the deed it was agreed that the principal should be repaid by the 30th Poos 1250 B. S., or the 13th January 1843, and the interest discharged from the interest receivable by the rajah on rs. 40,000 in Government paper, and from the profits of mouzah Seebnibas and other property conditionally sold by this deed to Mr. Harris; and that, if the principal and interest were not paid within the time fixed, the sale of the property should become absolute.

Previous to this transaction with Mr. Harris, Rajah Gungaishchunder had borrowed rs. 13,638 from Suroopchunder Sircar, father of the defendants, appellants, and executed a deed of sale of Seebnibas and other property, the subject of the present suit, on 23rd Jeyt 1232 B. S., or the 4th June 1825, in favor of Suroop Sircar, who, at the same time, gave the rajah an ikrar, which provided that the principal should be paid by the 30th Cheyt 1233 B. S.; that, if the principal were paid within the time agreed upon, interest should not be charged; but, if the mortgagee were obliged to issue notice of

Held, that as the mortgage bond referred to by the defendants was security for the payment only of the principal of their debt, which was liquidated before the expiry of the year of grace, and the property was sold by them in execution of their decree for interest, not in virtue of their mortgage, but as simple decree-holders, they purchased the property with all liens created on it by the judgment debtor. Held, further, that where execution of a deed is admitted, and a plea of collusion to set it aside is urged, it is necessary to prove such collusion. Appeal dismissed.

foreclosure, interest would be charged from the date of issue of notice. The rajah failed to pay the principal within time, and notice of foreclosure was issued on the 16th December 1839. He, however, paid in the amount on 11th Poos 1247 B. S., or the 24th December 1840, before the year of grace had closed ; and Suroopchunder Sircar, on the 25th May 1842, brought an action to recover the interest, amounting to rs. 4703-9-8, and on the 6th September 1843 obtained a decree, in execution of which he sold the property which had been pledged as security for the original debt, (the heirs of Mr. Harris filing a petition objecting to the sale,) and purchased it himself, and took possession. The landed property, comprising Seebnibas, Ghur Kunkuna, &c., appears to have been sold on the 10th January 1848 ; the buildings thereon were subsequently sold on the 31st July 1850, for the realisation of costs due by the rajah to Suroop Sircar in a case brought by the former, which had been dismissed.

As the rajah made over only rs. 16,000 worth of Government paper to Mr. Harris, instead of rs. 40,000, the interest due on the money borrowed was not liquidated, and the plaintiff, who now represents Mr. Harris as the proprietor of the Khalbolya concern, after having duly issued notice of foreclosure, sued for possession, making both the rajah, who executed the deed, and the heirs of Suroop Sircar, who were in possession as auction purchasers, parties to the suit, and obtained a decree, with wasilat from date of suit, on the 29th July 1856.

The defendants, heirs of Suroop Sircar, appeal from that decision, urging : *first*, that, as the rajah mortgaged the property to Suroop Sircar, he had no power to mortgage it to another party till the principal and interest of his debt to Suroop Sircar were liquidated ; that Suroop Sircar, having obtained a decree for the interest due, sold the mortgaged property, and purchased it himself ; and under these circumstances the appellants cannot be ousted : *secondly*, the sale to Mr. Harris was collusive, and it is not proved that any consideration passed from Mr. Harris to the rajah.

With regard to the first plea, we observe, that the defendants, appellants, obtained possession of the property, not in virtue of their mortgage, but as simple decree-holders, who, having put up the rights and interests of their judgment debtor for sale, have purchased his rights and interests in the property, subject to all liens he had already created upon it. And, with regard to the second objection, we find, as pointed out by the counsel for appellants, that the principal sudder ameen has, by recording marginal remarks, thrown discredit on four out of five witnesses examined for the plaintiff, to prove execution of the bond on which this claim is based and the payment of consideration, and yet has declared that both execution and payment of consideration are proved by the plaintiff's witnesses. We think, however, this apparent inconsistency on the part of the lower court

is not a sufficient reason for interfering with the judgment; for the execution of the deed, which recites the purpose for which the loan was incurred by the rajah, viz. to pay off the debt due to Suroopchunder Sircar, is not disputed, and the defendants have not attempted to prove the charge of collusion, by which they seek to avoid the effect of the plaintiff's mortgage. It is not sufficient for defendants to plead collusion when a deed of sale has been executed and no question as to its execution arises. To set such a deed aside, they must also prove collusion. For the above reasons we see no grounds for interfering with the decision of the lower court, and dismiss the appeal, with costs.

THE 15TH FEBRUARY 1859.

H. T. RAIKES and J. H. PATTON, ESQs., Judges, and G. LOCH, Esq.,
Officiating Judge.

Case No. 641 of 1857.

*Regular Appeal from the decision of Mr. John Weston, Second
Principal Sudder Ameen of Tirhoot, dated 4th August 1856.*

Maharajah Moheshur Singh, (Plaintiff,) *Appellant,*
versus

Baboo Rumabut Singh, (Defendant,) *Respondent.*

*Baboos Ramapersad Roy and Kishenkishore Ghose, for Appel-
lant.*

Baboo Premchand Paul, for Respondent.

Suit laid at Company's Rupees 5595-14.

The survey officers awarded possession of 160 out of 279 beegahs claimed. A previously pending suit for the whole being nonsuited after the award, it was held that the limitation prescribed by Act XIII. of 1848 did not apply to the surplus 119 beegahs, and that plaintiff's not having specifically sued to set aside the award was immaterial. Case remanded, for investigation as to the rights of the parties to the 119 beegahs.

THE plaintiff in this suit sued for possession of 279b.-13c.-18d. of land in mouzah Deepnodhorah, in accordance with an arbitration award of the 8th January 1845, and has been nonsuited by the court below, on the ground that a *possessory* title to the land in question was declared in favor of the defendants by the survey officers, when the revenue survey was made, and that plaintiff was bound to sue to set aside that award before he could bring an action for possession.

From this order the present appeal is preferred; and plaintiff's (appellant's) pleader has shown us, that the possessory award made by the survey officers was only to the extent of 160 *beegahs* of the lands in suit, and was made in consequence of plaintiff's ryots claiming possession of this quantity of land as a portion of plaintiff's village, lands which they asserted should be included within the survey boundaries of that particular village. In this matter they were opposed by the defendants, and on proof of possession being

with the latter, the award of the survey officers was in their favor.

Plaintiff himself appealed to the superintendent of survey, but the order of the deputy collector was upheld.

Appellant's pleader now urges that, at the time when these proceedings were held before the survey officers, a suit was actually pending for these lands, which suit was subsequently nonsuited, and this present action brought in its place. Under these circumstances the pleader urges that the award of the survey officers can be no bar to the plaintiff's claim, as that claim was *pending* in court before the survey commenced, and could not be affected by any proceedings had before those officers, and that the order of nonsuit, subsequently passed, entitled the plaintiff to renew his action in the present form.

We are of opinion that, so far as the award passed by the survey officers affects any portion of the lands in suit, to that portion of the lands the limitation prescribed by Act XIII. of 1848 will apply.

By the provisions of that law, a possessory title acquired under an award cannot be questioned by the party or his representative against whom the award was passed, unless the justice of the award is contested by a regular suit within the limitation prescribed by the different Sections of the Act. A decision of this Court to this effect was passed in a case under precisely similar circumstances to the present, on the 31st December 1857, page 1935 of the Decisions of that year—Maharajah Koowur Purtab Singh *versus* Maharajah Mohessur Singh.

The award of the survey officers regarding the lands now in litigation was given on the 24th August 1848, while the present suit was instituted on the 21st June 1854. There can be no doubt, then, that plaintiff has not sued within time; but, as the claim now before us is for 279*b*.-18*c*.-15*d*., and the award of 1848 only adjudicates upon 160*b*.-15*c*., we see no reason why this suit may not go on for the remaining 119 beegahs.

It is of no material consequence in conducting the investigation that plaintiff has not specifically sued to set aside the award in the present action. His claim may be considered as for possession of 279 beegahs, *notwithstanding* an award has been passed for 160 beegahs, and the action so worded would be effective for the purpose.* There is nothing, however, in the omission adverted to by the lower court to prevent the defendant's plea in defence being heard and adjudicated upon; and the court being, therefore, perfectly capable of dealing with all the facts, and of doing justice between the parties in this action, we see no reason for the nonsuit; and, accordingly, remand the case, for trial on its merits regarding the right of the parties to the remaining 119 beegahs.

Ordered accordingly.

THE 16TH FEBRUARY 1859.

A. SCONCE, Esq., Judge, and C. B. TREVOR and H. V. BAYLEY, Esqs.,
Officiating Judges.

Case No. 318 of 1858.

Special Appeal from the decision of Baboo Gorgoram Borooah, Sudder Ameen of Kamroop, dated 7th January 1858, reversing a decree of Baboo Radhakant Borooah, Moonsiff of Runga, dated 3rd November 1857.

Shumbhoonath Deka, (Defendant,) *Appellant,*
versus

Tearam Surma, (Plaintiff,) *Respondent.*

Baboo Aushootosh Chatterjee, for Appellant.

Baboo Taruknath Sein, for Respondent.

Held, a plaintiff was inadmissible where the boundaries given in the original and amended plaintiff varied.

THIS case was admitted to special appeal on the 13th May 1858, under the following certificate recorded by Messrs. J. H. Patton and A. Sconce.

"It appears that 37 poorahs of land, situated in two villages, Koraria and Gudhadur Reugea, having been possessed by several parties, were sold in two portions, of which petitioner purchased 34 poorahs and the plaintiff in this suit 3 poorahs. Plaintiff, asserting that the 3 poorahs purchased by him were all situated in Koraria, now sues for possession. By the moonsiff plaintiff's suit was dismissed, but having been decreed by the principal sudder ameen, defendant, petitioner, brings forward two grounds of special appeal: first, he contends that, as, after the pleadings were closed, and after the report of an ameen had been handed in, the plaintiff, departing from the boundaries given in his original plaintiff in conformity with his deed of sale, gave in a supplementary plaintiff, in which the land claimed was set forth by new boundaries in a new position, the suit should have been dismissed.

"It would appear that the moonsiff held the boundaries of the supplementary plaintiff to differ from those of the plaintiff, as well as those of the report of the ameen; but the principal sudder ameen, while he considered the ameen's boundaries and the boundaries of the supplementary plaintiff sufficiently to correspond, does not notice the discrepancy between the latter and the boundaries of the original plaintiff.

"A second point taken by petitioner, to the effect that the principal sudder ameen had misapprehended the nature of a measurement paper, was not an issue which can be taken to vitiate the principal sudder ameen's judgment; for, admitting the contents of that paper to be as stated, he held that defendant, petitioner, had fraudulently caused the distribution of the land to suit his own purposes. But

we admit the special appeal on the first point, to try whether, in consequence of the plaintiff's claim being varied by the supplementary plaint, the suit should not have been dismissed."

JUDGMENT.

On a reference to the judgment of the principal sudder ameen, we find that he only differed from the moonsiff in respect to the boundaries, in considering that the boundaries given in the ameen's report and the supplementary plaint agreed. But the moonsiff has held, that the variation between the original and the amended plaint rendered plaintiff's suit inadmissible, and dismissed it. The pleader for the special appellant has not been able to show us that the moonsiff was incorrect in holding this, and that the boundaries did not vary. As such a variance in a supplementary plaint, filed after the pleadings had closed, rendered the plaintiff's suit inadmissible, we reverse the order of the principal sudder ameen, decreeing plaintiff's suit, and affirm the decision of the moonsiff, with costs on special respondent.

THE 16TH FEBRUARY 1859.

A. SCONCE, Esq., Judge, and C. B. TREVOR and H. V. BAYLEY, Esqs.,
Officiating Judges.

Case No. 431 of 1858.

*Special Appeal from the decision of Mr. J. Reily, Principal
Sudder Ameen of Dinagepore, dated 15th December 1857,
reversing a decree of Moulvee Abdool Mujeed, Moonsiff of
Peergunge, dated 7th May 1857.*

Bhooee Jhaboo Sircar, (Plaintiff,) Appellant,
versus

Huryanee Bewah, mother of Nazir Mahomed, and others, (Defendants,) Respondents.

Baboo Taruknath Sein, for Appellant., *Ex-parte.*

THIS case was admitted to special appeal on the 14th July 1858, under the following certificate recorded by Messrs. C. B. Trevor and H. V. Bayley.

"Plaintiff sued defendant on the ground that defendant Huryanee's husband had executed a kistbundee for rs. 47-8, and had paid rs. 11-8 only, and that rs. 57-9 were due to plaintiff as principal and interest.

"Defendant pleaded that the kistbundee for rs. 50 was forcibly taken from the debtor, and that compound interest had been charged, and no credit given for rents assigned, which came to rs. 24, and that defendant had made two payments of rs. 15 and rs. 30.

The special appeal was admitted on the ground of the principal sudder ameen having misconstrued the replication. That view was taken from the abstract of the pleadings in the decision, which alone was adduced. But on the original pleading being perused, no misconstruction was found. Special appeal dismissed.

"The moonsiff decreed the plaintiff's claim ; but on appeal the principal sudder ameen decreed the appeal, on the ground that the debt was more than half usurious, which, in itself, afforded a presumption that the kistbundee was extorted ; and that one of defendant's witnesses proved the payment of rs. 30, for which plaintiff had not given credit ; and, further, that plaintiff had not appeared, nor produced his accounts.

"The special appellant urges, as his main plea, in special appeal, that the principal sudder ameen has based his decision of usury, and the presumption he derives from it of the kistbundee's having been extorted, on a misconstruction of the plaintiff's replication, which the principal sudder ameen has construed to contain an admission by plaintiff that only rs. 23-10 were due, whereas that pleading states that rs. 21 being due for an advance for jute, and rs. 23-7 on account of the balance of plaintiff's debt, a kistbundee, including demands of interest, was executed for rs. 50.

"On a reference to the record, we find that the principal sudder ameen has misconstrued the replication in the manner stated by the special appellant, and having done so, has based his judgment on wrong data.

"The real issues in the case were : *firstly*, whether the kistbundee had been forcibly taken ; *secondly*, if it had not been so taken, whether illegal interest had been taken in contravention of Section XI. Regulation XV. of 1793, and, if not, whether defendant had proved his special plea of payment of rs. 30 ; and, *lastly*, if defendant did not prove this, whether plaintiff was entitled to a decree.

"We would admit the special appeal, to try whether the case should not be admitted for re-trial on these issues, and with reference to the above remarks."

JUDGMENT.

This special appeal was admitted with reference to the abstract of the replication given in the judgment of the moonsiff ; but on referring to the original record, we find that the principal sudder ameen has not inaccurately represented the statement of the plaintiff. Under such circumstances, as the judgment of the principal sudder ameen is based on his inference from the evidence before him, we dismiss the special appeal.

THE 16TH FEBRUARY 1859.

H. T. RAIKES and J. H. PATTON, ESQS., Judges, and G. LOCH, ESQ.,
Officiating Judge.

Case No. 181 of 1858.

Special Appeal from the decision of Mr. E. F. Radcliffe, Officiating Additional Judge of Chittagong, dated 9th November 1857, reversing a decree of Moulvee Syud Ahmed, Moonsiff of Putya, dated 10th November 1856.

Ruhmut Alee, (one of the Defendants,) *Appellant,*
versus

Saaduk Alee, (Plaintiff,) and Mahomed Buzl and others, (Defendants,) *Respondents.*

Moulvee Murhumut Hossein, for Appellant.

Moulvee Aftaboodeen Mahomed, for (Plaintiff) Respondent.

THIS case was admitted to special appeal on the 11th March 1858, under the following certificate recorded by Messrs. B. J. Colvin and J. S. Torrens.

The requirements of the law of pre-emption were not fulfilled by respondent. Lower court's order reversed.

"Petitioner was defendant in a pre-emption suit, which, being dismissed by the first court, was decreed against him by the lower appellate court. It is objected in special appeal that the judge has overlooked absence of proof of the tullub mowasibat, and has decided altogether upon proof of the tullub ishtishad. We admit the special appeal to try the correctness of the judge's decision."

JUDGMENT.

The pleader on the part of respondent (plaintiff) does not show us that his client avers, in his plaint, that he made the immediate declaration required by the Mahomedan law, under the term "tullub mowasibat," but that he, on hearing of the sale, immediately proceeded to the vendor's house to offer the money. This is insufficient to fulfil the requirements of the law of shuffa or pre-emption, and respondent is not entitled to the preference he claims.

We, therefore, reverse the judgment of the zillah court, with costs on the respondent.

THE 16TH FEBRUARY 1859.

H. T. RAIKES and J. H. PATTON, ESQs., Judges, and G. LOCH, Esq.,
Officiating Judge.

Case No. 241 of 1858.

Special Appeal from the decision of Mr. Charles Mackay, Principal Sudder Ameen of Sylhet, dated 9th November 1857, reversing a decree of Moulvee Nusseeroodeen Hyder, Sudder Moonsiff of that district, dated 12th June 1857.

Muthoor Dhoolee, (Plaintiff,) *Appellant,*
versus

Meghooram Gauzur and others, (Defendants,) *Respondents.*

Moulvee Mahomed Ismail, for Appellant.

Baboo Baneymadhub Banerjee, for Respondents.

Case remanded, because lower court was bound under the circumstances to consider not merely whether the alleged dispossession had occurred, but much more to which party belonged the right of inheritance claimed by both.

THIS case was admitted to special appeal on the 6th April 1858, under the following certificate recorded by Messrs. B. J. Colvin and A. Sconce.

"Petitioner sued to recover possession of land professed to be held by special respondents under deeds of sale from petitioner's step-grandmother and mother. The decision in his favor by the first court, which rejected the deeds of sale, as the females had no power to execute them, was set aside by the principal sudder ameen in appeal, on the ground that the land had passed by the deeds in question into possession of special respondents, in 1229 and 1235 B. S., since which time they had retained possession, and, although petitioner had only attained majority in 1256 B. S., his mother, during his minority, had not preferred any claim to the property in dispute.

"It is urged in special appeal, that the principal sudder ameen has overlooked the reasons of the moonsiff, based upon the incompetency of the females to alienate. We admit the special appeal, to try whether the deeds relied upon by special respondents are binding upon petitioner, who, it is allowed by the principal sudder ameen, sued considerably within twelve years after coming of age."

JUDGMENT.

The principal sudder ameen has not, by his judgment, met the grounds upon which the case has been decided by the lower court. That court held, in our opinion very properly, that plaintiff's dispossession in the particular way pleaded by him was not the governing issue in the case, as plaintiff's minority precluded limitation being applied to it: therefore, whether plaintiff was dispossessed or not by the defendants, he claimed the property as his inheritance, and defendants founded their own right of possession upon deeds of sale set up by them, and acquired from plaintiff's predecessor. As plaintiff

denied the execution of these deeds, the moonsiff went into the proof of their genuineness, and held they were not proved. Defendants then appealed, on the ground that plaintiff had been unable to afford any proof of his grandmother's possession, and of their dispossession at a particular time. On this one point the principal sudder ameen tried the appeal, and decided that plaintiff had not proved his grandmother's possession up to 1250 B. S., or that he himself had demanded possession on his reaching majority, and on this ground reversed the judgment of the first court. But we consider that the principal sudder ameen, although of opinion that the question of this possession, as put by the plaintiff, was not established, was bound to consider, whether the judgment of the first court on the other matters taken up and decided in plaintiff's favor was on matters that affected the real merits of the case, and were in themselves sufficient to warrant the judgment passed in plaintiff's favor. We therefore remand the case to the principal sudder ameen, that he may pass a fresh decision in conformity with these remarks.

THE 16TH FEBRUARY 1859.

A. SCONCE, ESQ., Judge, and C. B. TREVOR and H. V. BAYLEY, ESQS.,
Officiating Judges.

Case No. 466 of 1858.

Special Appeal from the decision of Baboo Doorgapersad Ghose, Additional Principal Sudder Ameen of East Burdwan, dated 26th February 1858, reversing a decree of Moonshee Bussheeroodeen Mahomed, Moonsiff of Munglekote, dated 18th July 1857.

Azeezoonissa, (one of the Defendants,) Appellant,
versus

Gholam Hyder and others, (Plaintiffs,) Respondents.

Moulvee Mahomed Ismael, for Appellant.

THIS case was admitted to special appeal on the 28th July 1858, under the following certificate recorded by Messrs. C. B. Trevor and H. V. Bayley.

"Sheikh Gholam Hyder and three others, amongst whom was one Dhunno Beebee, sued defendant Azeezoonissa for rent of 1258, due under a kuboolyut. The defendant admitted the execution of the kuboolyut, but pleaded that she had filed a relinquishment of the jote in the month of Assar, in the collector's office, and that, subsequently, Teencowree, the husband of one of the plaintiffs, Dhunno Beebee, cut the crops and re-sowed the land with linseed.

"The lower court was of opinion that the *istafa* pleaded by defendant could not alone exonerate defendant from liability. As, however, it was proved to the satisfaction of the court, that the husband of one of the plaintiffs had cut the crops and re-sown the

Special appeal dismissed, as the point on which it was admitted did not arise, the principal sudder ameen having held that the defendant cultivated the lands for 1258, and that if the plaintiff had cut the crops the defendant's remedy was to sue for damages.

land during 1258, the moonsiff was of opinion that those acts amounted to an acceptance on the part of all the plaintiffs, through Teencowree, of the relinquishment of defendant ; and under this view the moonsiff dismissed the plaintiffs' suit. On appeal the principal sudder ameen reversed the order of the moonsiff, being of opinion that the so-called deed of relinquishment, filed in the collectorate, was of no legal validity as against the plaintiffs, and that the cultivation of the lands by defendant in 1258 had been proved.

"Defendant now appeals specially, urging that the decision of the court below is defective, and that the principal sudder ameen should have passed an opinion before determining his liability on the evidence produced by them to prove that Teencowree, the husband of one of the plaintiffs, cut the crops and afterwards sowed the land with linseed.

"We think that the objection of the special appellant to the decision of the principal sudder ameen, as it now stands, is a valid one. We, therefore, admit the special appeal, to try whether the case should not be remitted, in order that the principal sudder ameen should give an opinion on the evidence produced by special appellant to prove her pleas ; and, in case, he credits that evidence, that he should determine what effect those acts have upon liability under the kuboolyut, the istafa of the land held under which she had admittedly filed in the collector's office."

JUDGMENT.

On a reference to the decision of the principal sudder ameen, we find that he holds that the defendant cultivated the lands for 1258, and that he gives his opinion that, even if defendant's plea that Teencowree, husband of one of the plaintiffs, had cut some of the crops, had been substantiated, the defendant could only have her separate remedy for damages.

The point referred to in the certificate does not arise, and we reject the special appeal, with costs.

THE 16TH FEBRUARY 1859.

H. T. RAIKES and J. H. PATTON, Esqs., Judges, and G. LOCH, Esq.,
Officiating Judge.

Case No. 173 of 1858.

Special Appeal from the decision of Mr. G. L. Martin, Additional Judge of Sarun, dated 29th December 1856; reversing a decree of Moulvee Alee Buksh, Moonsiff of Pursa, dated 20th February 1856.

Mohun Lal and others, (Plaintiffs,) *Appellants,*
versus

Gooroodyal Koowur and others, (Defendants,) *Respondents.*
Baboos Ramapersad Roy and Unnodapersad Banerjee, for
Appellants.

THIS case was admitted to special appeal on the 9th March 1858,
under the following certificate recorded by Messrs. B. J. Colvin and
J. S. Torrens.

See case cited.

“ This case is similar in its nature to No. 343, admitted on the
17th November 1857, and similar grounds of special appeal are
taken. We admit this petition for the reasons assigned in the certi-
ficate of admission of that petition.”

JUDGMENT.

This case follows the decision of this Court passed on an admitted
special appeal between the same parties, the subject matter of the
suit and the appeal therein being the same.

The decision referred to is No. 873 of 1857, passed upon the 17th
April 1858, page 743.

This case is accordingly remanded for the reasons therein set
forth.

THE 17TH FEBRUARY 1859.

A. SCONCE, Esq., Judge, and C. B. TREVOR and H. V. BAYLEY, Esqs.,
Officiating Judges.

Case No. 444 of 1858.

Special Appeal from the decision of Moonshee Nazeeroodeen Mahomed, Principal Sudder Ameen of Furreedpore, dated 6th January 1858, reversing a decree of Baboo Rasbeharee Bose, Moonsiff of Dundpore, dated 16th June 1857.

Gudadhur Ghose, (one of the Defendants,) *Appellant,*
versus

Woomachurn Ghose, (Plaintiff,) and Kalachand Ghose, (Objector,)
Respondents.

Baboo Aushootosh Chatterjee, for Appellant.

Moulvee Aftaboodeen Mahomed, for (Plaintiff) Respondent.

Held, that though, strictly speaking, a Hindoo widow has no general power to execute a *kida-bil-e-was*, which is more in the nature of a sale than a gift, still, in the present case, which is a transaction between the grandmother and her grandson, the Court consider the transaction in the light of a gift; and, consequently, it was quite competent to the grandmother, her own daughter or her grandson's mother not being alive, to transfer the property to her grandson, so to accelerate his succession and to place him in a position at once of asserting his right to his grandfather's property. Special appeal rejected, with costs.

THIS case was admitted to special appeal on the 19th July 1858, under the following certificate recorded by Messrs. C. B. Trevor and H. V. Bayley.

"The case is stated to us, by the pleader of special appellant, as follows. Kanooram and Rughoonath were two brothers. Kanooram had no son. Rughoonath had two sons, Greeschunder and Gudadhur, defendants.

"Chittra Dassee was the widow of Kanooram. Kanooram left a daughter, who had a son, Woomachurn, the plaintiff.

"Kanooram gave Chittra Dassee permission to adopt. It is alleged she adopted Greeschunder, the son of Rughoonath, but that Greeschunder died, Chittra Dassee still surviving. Plaintiff, alleging a deed of gift from his grandmother, the above Chittra Dassee, sued for possession of one-third of a certain jote, which was held by a meerasdar.

"The moonsiff decreed plaintiff's claim against defendant and the meerasdar.

"On appeal by the defendant, the principal sudder ameen upheld the moonsiff's decision in favor of plaintiff, but reversed it in respect to the meerasdar. The principal sudder ameen found, as a fact, that the adoption was not proved.

"The special appellant's pleader urges, *first*, that, taking the fact of the adoption not to be proved, Chittra Dassee, being a childless Hindoo widow, after the death of her alleged adopted son, had only a life interest in the property, and could not transfer an absolute title by deed of gift to plaintiff, and thus hasten the succession, which would have ordinarily come to plaintiff only through his mother, who is still living; *secondly*, that the adopted son, Greeschunder, having died before the adoptive mother, Chittra Dassee, the latter could only have a limited interest, under which she could not transfer the property by deed of gift.

“ As the principal sudder ameen has found, as a fact, that no adoption took place, we cannot admit this application on the second point ; but we admit it on the first point, to try whether Chittra Dasse, being a childless Hindoo widow, with a limited life interest, could, by Hindoo law, give an absolute title beyond that limited interest, by the deed of gift upon which plaintiff sues.”

JUDGMENT.

The plaintiff sued under a deed of gift for consideration from his grandmother for 2 droons of land, which belonged to his grandfather, Kanooram, and was in the possession of a meeradar and Gudadhur Ghose, the son of his grandfather's brother, Rughoonath.

Gudadhur, in his answer, pleaded, that his younger brother, Greeschunder, had been adopted by plaintiff's grandmother, Chittra Dasse, and on his death he had succeeded him.

The lower courts, as against Gudadhur, decreed in favor of plaintiff, rejecting the pleas set up by the defendants. In special appeal he has taken up a new ground, urging that Chittra Dasse, plaintiff's grandmother, had no power to execute a deed of hiba-bil-ewuz in plaintiff's favor, and thus to accelerate his succession.

We think that there is no validity in the objection raised by special appellant. We consider the hiba-bil-ewuz in the present case more in the light of a gift than as a sale ; and as plaintiff, under Hindoo law, would succeed his grandmother, for of the existence of plaintiff's mother there is no proof, we think that it was quite competent to her, by a deed of this nature, to place him at once in a position of asserting his right to his grandfather's property. We, therefore, reject this appeal, with costs.

THE 19TH FEBRUARY 1859.

A. SCONCE, Esq., Judge, and C. B. TREVOR and H. V. BAYLEY, Esqs.,
Officiating Judges.

*Regular Appeals from the decision of Mr. A. Davidson, Principal
Sudder Ameen of Midnapore, dated 20th December 1856.*

Case No. 181 of 1857.

Rajah Ajoodhyaram Khan, (Plaintiff,) *Appellant,*
versus

Musst. Khemunkeree Dasse and others, (Defendants,) *Respondents.*
Baboo Ramapersad Roy and Mr. R. T. Allan, for (Plaintiff,) Appellant.

Moonshee Ameer Alee and Baboo Kishenkishore Ghose, for (Defendants,) Respondents.

Case No. 204 of 1857.

Musst. Khemunkeree Dasse, (Defendant,) *Appellant,*
versus

Rajah Ajoodhyaram Khan, (Plaintiff,) and Rajah Ramchunder,
(one of the Defendants,) *Respondents.*

Moonshee Ameer Alee and Baboo Kishenkishore Ghose, for (Defendant,) Appellant.

Baboo Ramapersad Roy, for (Plaintiff,) Respondent.

Suit laid at Company's Rupees 6231-11a.-16g.-2c.

Suit brought by A to recover, under the will of his father B, a village purchased with funds of B, in the name of a younger brother C, and which C, through a foreclosed mortgage, had sold. The purchase of the village from the funds of the father B is accepted as established; hence is assumed the presumption that the purchase was originally made for the father's benefit as real purchaser, and that the onus of rebutting this presumption was cast on defendant.

It is held to have been proved by defendant that, reckoning from plaintiff's majority, for more than twelve years plaintiff did not enjoy any possessory interest in the village, and, assuming that the original purchase created a presumptive or resulting trust in favor of the father B, it is also held that limitation runs against B, or his representative A, and in favor of the adverse right enjoyed for more than twelve years by C and his vendee.

Held, also, that the nature of this case (that is, the possession and ostensible title of B) so substantially differed from an earlier action between the two brothers, in which, after an award made under Act IV. of 1840, plaintiff sued to recover as heir to his father, that plaintiff was not competent to take twelve years from the date of the decision in the first suit, within which to bring this suit.

Held, also, (in a separate appeal preferred by defendant,) upon the same ground, that plaintiff's failure to include this village in his first suit does not warrant the dismissal of this suit.

death, minors. Plaintiff's statement, as already said, is, that mouza Burisa Ramchuk was purchased by his father out of his own funds, and that the purchase so made formed part of his father's estate, though, as it happened, the name of his brother, Ramchunder Khan, was recorded in the title-deed as purchaser.

The principal defendant, Khemunkeree Dasee, widow of Mukoondram, meets the claim in the first instance by pleading the law of limitation. She asserts that Ramchunder Khan was the substantial proprietor of the disputed village; that he mortgaged and conditionally sold it on 15th Assar 1249 (1842) to Greedhur Mundul; that on 24th Jeyt 1251 Greedhur was paid off, and a second mortgage, also with terms of conditional sale, was made in favor of her husband, Mukoondram; that after foreclosure a decree for possession was passed on the 20th April 1846 (1253), and from the following month of May possession in execution was given to Mukoondram.

The principal sudder ameen has held plaintiff's suit to be barred by lapse of time. He remarks that plaintiff, by his own admission, was cognizant of the first mortgage to Greedhur in 1249; that Ramchunder Khan re-mortgaged the village to Mukoondram, in order to redeem the first mortgage; and that plaintiff's failure to assert his right from the time that, in 1249, the mortgagor's right became adverse to his, puts him out of court.

To the statement of these facts by the principal sudder ameen, appellant takes no exception; but the appeal has been argued on his behalf by Mr. Allan on the two following grounds. *First*, it is said that Rajah Mohunlall Khan, who supplied the funds with which the village was purchased in 1234, became the real proprietor; that his son Ramchunder Khan, the ostensible or benamee purchaser, was trustee for his father; and that the adverse title of Mukoondram did not arise till Bysakh 1253, when his decree was executed, or within eleven years anterior to the institution of the present suit. *Secondly*, it is urged that, as the plaintiff had occasion to sue his brother, Ramchunder Khan, under his father's will, for the possession of various estates, and judgment was finally given in his favor in the Sudder Court on the 30th April 1844, this suit, brought one day short of twelve years from that date, must be held to be within time.

Such is the nature of the appeal preferred by the plaintiff; but we have also a separate appeal on the part of defendant, who contends that, as the present claim is brought on the title of inheritance to recover a portion of the estate vacated by his father at his death, and as plaintiff, by not including this village in the suit decided on the 30th April 1844, must be held to have split the cause of action in the first instance open to him, this suit

should be dismissed under the circular orders of the 11th January 1839 and the 30th September 1847.

We will first deal with the plaintiff's appeal. The principal sudder ameen's finding substantially is that, for more than twelve years previous to the date of this suit, Ramchunder Khan, being in possession of the estate, had assigned the right of property therein for a good consideration to two successive mortgagees or vendees, with the knowledge of the assignment on the part of plaintiff; and upon that finding he has based his conclusion that the plaintiff's action is barred. For appellant nothing has been brought before us to qualify the legal effect of his silence. It is said that we should reckon the plaintiff's cause of action from the date of possession acquired by the second mortgagee, under his decree of the 20th April 1846; but it seems to us that, as regards plaintiff, what we have to look to is the exercise of a right adverse to his title, and that, without confining ourselves to the period during which the mortgages executed by Ramchunder Khan have had effect, what we have to consider is, whether the occupancy of Ramchunder Khan, half-brother of plaintiff, does not legally run against the latter, at least from the date of his majority in 1243. From that year to the date of suit, about twenty years elapsed. Throughout these twenty years, neither by the payment of Government revenue, nor by receipt of rent, nor by any recognition of his interest on the part of Ramchunder Khan, it is admitted, did the plaintiff enjoy possession of the village. What alone we know in favor of plaintiff is that, at the purchase of Burisa Ramchuck in 1234, the price was paid by Rajah Mohunlall Khan. In the defendant's pleadings we are shown no denial of this averment, and the fact of payment by Rajah Mohunlall may be assumed. So far then, as was observed in the judgment of the Privy Council, in the case of Gopeekrist Gossain (Moore, vol. VI., page 53), the purchase-money having been paid by the father, we may have presumptive evidence that, at that date, the purchase was made for his benefit as real purchaser, the ostensible purchaser, Ramchunder, being a trustee for him; but this inference was understood to amount only to a *prima facie* proof of the real purchase, casting on the ostensible purchaser the burden of rebutting it. The presumption, that the payment of the purchase-money signified that the purchase had been made for the benefit of the payer, was not intended to supersede the entertainment of evidence in favor of the right of the ostensible purchaser, and necessarily could not have the effect of depriving an adverse title of that protection, which, under the law of limitation, neglect to sue extends to those in the enjoyment of it. The very purpose of the law of limitation is to quiet and confirm a title, which, possibly, in the first instance, might be capable of being supported by

evidence inferior to that which, another party failing in time to bring forward, cannot in the end be used by him to remedy an ancient wrong. Mr. Story observes—"As long as the relation of trustee and *cestui que* trust is acknowledged to exist between the parties, and the trust is continued, lapse of time can constitute no bar to an account or other proper relief for the *cestui que* trust; but where this relation is no longer admitted to exist, or time and long acquiescence have obscured the nature and character of the trust, or the acts of the parties or other circumstances give rise to presumptions unfavorable to its continuance—in all such cases a court of equity will refuse relief, upon the ground of lapse of time and its inability to do complete justice. This doctrine will apply even to cases of express trust, and, *à fortiori*, it will apply with increased strength to cases of implied or constructive trusts." Of the latter class is the case now before us. The payment of the purchase-money by Rajah Mohunlall Khan creates a presumptive or resulting trust in his favor, and we do not doubt that the creation of such a trust is subject to the operation of the law of limitation. Here the sole occupancy of Ramchunder Khan, or of his vendee, for twenty years before the date of suit, that is, from the date of plaintiff's majority and of the non-enjoyment by plaintiff of any beneficial interest in the village for the same period, is uncontested. Defendant, the vendee, is in possession of the original title-deeds of 1234. Indeed, we have no statement in the plaint that Rajah Mohunlall Khan had assigned the village to his infant son, Ramchunder Khan, in trust for himself. On the contrary, plaintiff's statement is, that his father had given *him* possession, and that his brother, Ramchunder Khan, in collusion with the mortgagees, had assumed the right to assign the village to them. But no evidence is offered in support of this statement, and rather the (plaintiff's) appellant's reliance is simply placed on the presumption of the trust, with which, as a representation of facts, it so very materially conflicts. Upon the whole then our conclusion is, that the adverse title and occupancy asserted by Ramchunder Khan, and the defendant who holds from him, for more than twelve years from the (plaintiff's) appellant's majority, bar this action.

We come now to the second point brought before us in the appeal of plaintiff. Assuming that the law of limitation, as above considered, bars the action, it is contended that the pendency of the plaintiff's first suit against his brother relieved him from the necessity of suing, and that, coming within twelve years from the decision of that suit, on the 30th April 1844, he is within time. It appears to us, however, that the ground of plaintiff's action in the two cases is dissimilar. The first suit referred to a zemindaree, of which the acknowledged right was vested in Rajah Mohunlall Khan to his death; and as the session judge, in disposing of a dispute

between the two brothers under Act IV. of 1840, adjudged half of the estate to Ramchunder Khan, in succession to his father, Rajah Ajoodhyaram Khan, brought his action to establish his sole title, both by the custom of the family and his father's will. Here, however, we have a case in which no adjudication had been made under Act IV. of 1840, in which plaintiff personally has had no possession at all, and of which the ostensible title, as well as possession, lay with his brother, Ramchunder Khan ; and thus it seems to us that this suit substantially involved a different cause of action than that of succession to a common ancestor.

The same argument applies to the separate appeal of the defendant. She asks us to throw out the suit, not merely upon the law of limitation, but upon the preliminary plea, that it was wholly inadmissible, as the property should have been embraced in plaintiff's first suit. Holding, however, the cause of action to the two suits to be dissimilar, this plea cannot be maintained.

We dismiss both appeals, with costs of appeal in each case on the appellant.

THE 21ST FEBRUARY 1859.

H. T. RAIKES and B. J. COLVIN, Esqs., Judges, and G. LOCH, Esq.,
Officiating Judge.

Case No. 132 of 1857.

Regular Appeal from the decision of Baboo Gobindchunder Chowdree, Principal Sudder Ameen of Moorsheadabad, dated 19th December 1856.

Ranee Prosunmoyee, mother and guardian of Koowur Doerganath Roy, minor, (Plaintiff,) Appellant,
versus

Ramsoonder Sein and others, (Defendants,) Respondents.
Baboo Ramapersad Roy and Kishenkishore Ghose, for Appellant.
Baboo Shumbhoonath Pundit and Moonshree Ameer Alee, for Respondents.

Suit laid at Company's Rupees 14,850.

THIS suit was instituted on the following grounds.

Suit to cancel deeds of lease and assignment by a widow, dismissed in affirmation of the judgment of the lower court. Held, that as the widow was left "mistress" of

Rajah Mohanund Roy had three sons, namely, Roy Ramkishen, Roy Jyekishen, and Roy Bejoykishen.

By the death of the second son and his wife without children, one-third of the estate left by Mohanund came into the possession of Ranee Bhageeruttee, widow of Ramkishen, and the remaining two-thirds into that of Roy Bejoykishen. This person left a widow, Rasmunnee, empowered to adopt a son ; and she accordingly

lfe, the deeds could not be questioned in her life-time.

adopted Roy Kishenchunder, deceased, husband of plaintiff, appellant, who, in her turn, being empowered by deed, dated 13th Kartikh 1250, to adopt a son, adopted in the first instance Gopeemohun, and on his death Koowur Doorganath, in whose behalf she has brought this action, the object of which may now be stated. Rajah Mohanund had constituted a particular village as dewuttur for the service of the idols Radhamohun Thakoor, &c., the proceeds of which, or rs. 825, after deducting the expenses of collection, were to be appropriated to the purpose; but Rasmunnee, widow of Mohanund Roy, had given the village as a mookurruree mowroosee tenure, for a consideration of rs. 1900, at a jumma of rs. 325, by a deed, dated 18th Cheyt 1254, to Ramsoonder Sein, and had again, for a consideration of rs. 1700, by a deed dated 17th Cheyt 1255, assigned rs. 300 of that sum to Sudakishen Sein; so that there remained but rs. 25 available for the expenses of the idol. This suit was, therefore, brought to cancel both deeds as given by Rasmunnee in perpetuity, while she could not possibly have more than a life interest, and as alienating the proceeds from the purposes of the idol, which even her husband could not have done. Possession of the village was also applied for by plaintiff.

The principal sudder ameen dismissed the suit, on the ground that the very unnomutee putro, under which appellant had performed the act of adoption, reserved to Rasmunnee authority over, and the management of, the property during her life-time; so that while she lived, appellant could not question her acts. To annul this provision of the deed, a dustburdaree or deed of relinquishment of her rights by Rasmunnee was pleaded; but this document was rejected by the principal sudder ameen as fraudulent. It has not been argued before us that this dustburdaree is genuine; but it is contended that, even if possession cannot be granted to appellant, the deeds should be set aside, and that the truth or otherwise of her alleged seal and signature to them, which she denied, should be inquired into.

We find that the principal sudder ameen has decided this case with reference to the precedent of Radhamunnee Debea and others, decided on the 10th April 1855, in which it was held that the plaintiff was debarred from suing during the life-time of the widow of the man under whose will his right arose, because, as in this case, the will gave to the widow unrestricted power over the property during her life-time. And against this precedent that of the 24th July 1854, in the case of Bolakee Beebee, is cited, which declared that reversionary heirs might sue in the life-time of a widow to invalidate alienations by her.

JUDGMENT.

Messrs. H. T. Raikes and B. J. Colvin.—In this case it is allowed that Rasmunnee is to retain the management of the estate as “mistress” during her life-time. The rights of the adopted son of appellant do not supervene until her death. It follows that Rasmunnee may do, in the exercise of her authority as regards the estate, all acts but such as shall permanently affect the rights and interests of the reversionary heir. Now the acts of alienation charged against her are not necessarily acts of waste. The deeds of lease and assignment state that the money was borrowed for the purposes of the temples. This act of borrowing was quite within the competence of Rasmunnee; but it is alleged that the money was not so appropriated, and that the temples have been allowed to go to decay and are in want of repairs. It is to be considered if any obligation other than moral rested upon Rasmunnee to preserve the temples; we are not shown that any legal obligation to preserve them was imposed upon her. There was no trusteeship constituted, the conditions of which she was bound to fulfil. She was left at full liberty in the exercise of her management; and if she chose to neglect her duties relating to the temples, she seems to us as little liable to be challenged on behalf of the minor son as he himself would be by his heirs, were he, on acquiring the estate, similarly to neglect his duties. Suppose that Rasmunnee, instead of assigning away the rent, had duly collected the full amount of rs. 825, without, however, keeping the temples up, could appellant have brought a suit against her to compel her to preserve them? We think not, for this reason, that she was only under a moral obligation to preserve them, but was not legally bound to do so. Hence it appears to us that appellant cannot have the deeds in question cancelled so long as Rasmunnee lives.

We, therefore, dismiss this appeal, with costs.

Mr. G. Loch.—It appears to me that the principal sudder ameen has disposed of this case on wrong grounds. The object of the suit was to set aside certain deeds, alienating dewuttur lands, executed by Ranee Rasmunnee, one of the defendants, in favor of the other defendants, and to obtain possession thereof on the plea of waste and injury caused by the said ranee defendant.

The history of the case may be recited in a few words. Roy Bejoykishen died, leaving his widow Ranee Rasmunnee, with power to adopt. She adopted Roy Kishenchunder, who died without issue, leaving his widow, Ranee Prosunnomoyee Debea, the plaintiff, power to adopt, which she has done. The permission to adopt given by Roy Kishenchunder to his widow contained a provision, that the whole of the ancestral property should remain in the possession of

his adoptive mother, Ranee Rasmunnee, during her life, and on her death should pass to the son adopted by his own wife. Among the property left in the possession of Ranee Rasmunnee were certain dewuttur lands, the proceeds of which, it is alleged, were employed in keeping up the worship of certain family idols and repairing the temples. And it is now asserted that Ranee Rasmunnee, under pretence of obtaining money to erect a new temple and to repair those already in existence, has, by two deeds, one a mookurruree lease, and the other a bill of sale, alienated the dewuttur lands to the other defendants, and has appropriated the money obtained from them to her own use; and, in consequence of the proceeds of the dewuttur lands being turned aside from their legitimate purpose, the worship of the idols has been put a stop to, and the temples have fallen into disrepair; and, plaintiff sues to be put in possession, as the guardian of her adopted son, to prevent further injury to the estate.

However incorrectly the prayer of the plaint may be drawn up, the object of the suit is obvious. The ground for interference with Rasmunnee's possession, who has a life interest in the property, is to prevent further waste. The questions, therefore, which were primarily before the principal sudder ameen, were, *first*, does waste form a sufficient ground for interference on the part of the reversioners? and, *secondly*, has waste been committed, and, if so, is plaintiff entitled to obtain possession as trustee? for in no other character can she hold possession during the life-time of Rasmunnee, and to have the deeds executed by Rasmunnee cancelled. It is unnecessary in this place to determine what constitutes waste, for my object is only to point out the mistake made by the principal sudder ameen in deciding this case, and not to enter into the merits. Instead, however, of disposing of the first and obvious point at issue, whether interference was warranted on the plea of waste, he determines that no interference can be allowed, because the deed of permission to adopt, given by Roy Kishenchunder to the plaintiff, provides that the possession and management of the ancestral property should remain with Rasmunnee during her life-time. But surely if, as decisions of this Court have laid down, waste on the part of a widow in possession of ancestral property be sufficient warrant for reversioners to interfere and to deprive her of possession, the lower court should, in the first instance, have determined whether waste had been committed sufficient to warrant the removal of Rasmunnee from the management of the property; and in the event of this being proved, the permission of her adopted son to hold possession during life would be no bar to her being deprived of possession. I would, therefore, remand the case for the disposal of the points above alluded to.

THE 21ST FEBRUARY 1859.

A. SCONCE, ESQ., Judge, and D. I. MONEY, ESQ., Officiating Judge.

Petition No. 1646 of 1858.

Application for Special Appeal from the decision of Mr. R. C. Perry, Sub-Assistant Commissioner of Manbhoom, dated 29th June 1858, reversing that of Brojonath Bose, Sudder Moonsiff of that district, dated 31st March 1858, in the case of

Bhunjun Singh, *Plaintiff*, Petitioner,
versus

Mayaram Pandey and others, *Defendants*.

Baboo Judganund Mookerjee, for Petitioner.

Baboo Kishensukha Mookerjee, for the Opposite Party.

Suit being brought to recover possession of certain lands, the first court tried the fact of possession only: on appeal, the case was disposed of on the question of right.

Remanded, that the question of right may be disposed of by the first court.

It is hereby certified that the said application is granted on the following grounds.

The petitioner brought a suit for possession of land in the moonsiff's court, and obtained a decree, the moonsiff finding possession in the plaintiff of the disputed land, as belonging to his village and holding, established.

The defendants on appeal obtained the reversal of this decree, the sub-assistant commissioner going into the evidence as to the right to possession, and deciding upon the merits in favor of the defendants.

The petitioner urges in special appeal, that, inasmuch as the assistant commissioner held that the mere fact of possession was insufficient, and that the moonsiff should have tried the right of the parties to the property claimed, they were entitled to an adjudication of this point by the lower court, and the case should have been remanded to the moonsiff for that purpose.

We think there is some ground for this objection; and as the judgment of the assistant commissioner is rather curt and not very clear, the case will be returned to him, with directions that he will remand it to the moonsiff's court for a full investigation on the merits.

THE 21ST FEBRUARY 1859.

A. SCONGE, ESQ., Judge, and D. I. MONEY, ESQ., Officiating Judge.

Petition No. 1120 of 1858.

Application for Special Appeal from the decision of Baboo Nobinkishen Paulit, Principal Sudder Ameen of Chittagong, dated 6th April 1858, reversing a decree of Moulvee Sookur Alee, Moonsiff of Satkaneah, dated 27th June 1855, in the case of

Abool Fuzzul, Plaintiff,

versus

Mahomed Budul, one of the Defendants, Petitioner.

Baboo Kishensukha Mookerjee, for Petitioner, Ex-parte.

THIS suit was brought to recover a small portion of land as lakhiraj, of which petitioner, one of the defendants, professed to hold 12 gundahs as mortgaged to him by Futeh Alee.

The moonsiff dismissed the suit on the merits,—the principal sudder ameen, on limitation and upon the incompetency of the courts to question a settlement made of the land as noabad by the revenue authorities ; but, on special appeal, these grounds were held to be untenable, and the case was remanded.

Case remanded, to try the question of title as between the claimants to the land sued for, the lower appellate court having confined itself to an adjudication as to the nature of the land.

The case is now again disposed of by the principal sudder ameen. But the ground taken in special appeal by petitioner is that, admitting the land not to be noabad, the principal sudder ameen has failed to determine as between plaintiff and petitioner, whether the right of possession to the 12 gundahs held by petitioner is vested in petitioner or in plaintiff. The principal sudder ameen, we observe, appears to confine himself to the forcible appropriation of the land by Government, and does not enter into the question of title as between plaintiff and petitioner ; and for that purpose we remand the case, for the re-consideration of the claim of plaintiff to that portion of the land which is in possession of petitioner.

THE 21ST FEBRUARY 1859.

C. B. TREVOR and H. V. BAYLEY, ESQS., Officiating Judges.

Petition No. 1597 of 1858.

Application for Special Appeal from the decision of Mr. W. S. Seton-Karr, Officiating Judge of Jessore, dated 21st July 1858, reversing that of Baboo Oopender Chunder Nyaruttun, Principal Sudder Ameen of that district, dated 15th February 1858, in the case of

Anundmoyee Dasse and others, *Plaintiffs*, Petitioners,
versus

Brojonath Pal Chowdree and others, *Defendants*.

Moonshee Ameer Alee and Baboo Dinnonath Mitter, for Petitioners.

Mr. R. T. Allan and Baboo Bungsheebuddun Mitter, for the Opposite Party.

Plaintiffs sued for possession of certain lands of which they had been illegally dispossessed by defendants, the farmers.

IT is hereby certified that the said application is granted on the following grounds.

Plaintiffs, petitioners, sued for possession of certain lands of which they had been illegally dispossessed by defendants, the farmers, on the 1st Bysakh 1260, with mesne profits from the date of dispossession.

Defendants denied the illegal dispossession of plaintiffs, but pleaded that, after the institution of the summary suit, they had sent a sezawul to collect the rents ; that the summary suit was decided *ex-parte* on the 31st August 1853, and the sezawul has collected, and is collecting, the rents ever since.

Defendants denied the illegal dispossession of plaintiffs, but pleaded that, after the institution of the summary suit on the 30th Jeyt, they had sent a sezawul to collect the rents ; that the summary suit was decided *ex-parte* on the 31st August 1853 or 16th Bhadro 1260, and the sezawul has collected and is collecting the rents ever since.

The judge, in reversal of the order of the court below, thought that the balance of evidence was in favor of the defendants. As, therefore, no forcible ejectment was proved, he dismissed the plaintiffs' suit.

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Plaintiffs have now appealed specially, urging that the answer of the defendants set forth no sufficient justification for their (plaintiffs') continued dispossession, but that, even on the finding of the judge, if the original dispossession by the sezawul was legal, that legality ceased after the decision of the summary suit, and the subsequent possession of defendant, as admitted by him, is altogether without warrant of law.

Plaintiffs have now appealed specially, urging that the answer of the defendants set forth no sufficient justification for their (plaintiffs') continued dispossession, but that, even on the finding of the judge, if the original dispossession by the sezawul was legal, that legality ceased after the decision of the summary suit, and the subsequent possession of defendant, as admitted by him, is altogether without warrant of law.

Held on special appeal, that the possession of a sezawul is a mere temporary possession for a particular purpose ; that, on that purpose being effected, it ceases ; and that it requires to be renewed in order to be legal.

Case remanded, in order that the judge may determine whether, after the decision of the summary suit *ex-parte* on the 31st August 1853, the possession of the defendant continued to be a legal possession or not, and pass whatever order may seem just and proper.

We think that the (plaintiffs') special appellants' objection is a sound one. They sue for possession, with mesne profits, alleging that their dispossession was effected illegally. The defendants plead that the possession taken by them was acquired legally, but they fail to plead in their answer sufficient to show that the possession at the present day is legal. Possession by sezawul is a mere temporary possession for a particular purpose, and, on the decision of the summary suit, necessarily ceases, though it can be renewed on the institution of a fresh one. Under this view, two issues arise in the present case. The *first* is, whether the original possession acquired by defendants was legal or not: the *second*, whether it has been legally continued or not, after the decision of the summary suit *ex-parte* on the 31st August 1853. The judge has clearly determined the first, but he has altogether overlooked the second issue. We, therefore, remit the case to him, with directions that he will enquire into the legality of the defendants' continued possession after the date on which the summary suit was decided, and pass whatever order may seem to him just and proper, after a consideration of the evidence produced on the point by both parties.

THE 21ST FEBRUARY 1859.

H. T. RAIKES and J. H. PATTON, ESQs, Judges, and G. LOCH, ESQ.,
Officiating Judge.

Case No. 405 of 1858.

Special Appeal from the decision of Mr. H. C. Halkett, Officiating Judge of Hooghly, dated 30th December 1857, affirming a decree of Mr. C. S. Belli, Officiating Collector of that district, dated 16th June 1856.

Hurmohun Mookerjee, (Plaintiff,) Appellant,
versus

Musst. Bhullee Bewa, widow of Ramdoolal (deceased,) and others,
(Defendants,) Respondents.

Moonshee Ameer Alee, Baboo Baneemadhub Banerjee, and Mr.
J. Newmarch, for Appellant.

Baboos Kishenkishore Ghose and Obhoychurn Bose, for Respondents.

THIS case was admitted to special appeal on the 30th June 1858, under the following certificate recorded by Messrs. C. B. Trevor and G. Loch.

"Plaintiff, special appellant, sued to resume 1-13 of land held rent-free. He appears to be a purchaser from one Bhugwuttee Dasse, a dur-mookurrureedar. Defendants assert their right to hold the land rent-free, having acquired it by purchase from parties holding under a char and a registered taidad.

Appeal dismissed. The lower court found defendant's lakhiraj title before December 1, 1790, valid, and that limitation barred plaintiff's claim.

"The collector on the merits upheld the defendants' title, considering that the documents produced by them were good and valid. On appeal, the case was remanded to the collector, in order that he might determine first what was put in issue before him, *viz.* whether the statute of limitations barred the plaintiff's claim or not. The collector, being of opinion that the law of limitation did apply, dismissed the claim. On appeal to the judge, he, from the evidence before him, entertained no doubt whatever that the defendants' right to hold the land in dispute as lakhiraj dates from a period antecedent to 1790, and therefore the Court's precedent of the 10th September 1855 applies.

"Plaintiff now appeals specially, urging that the judge has not correctly applied the law; that it was necessary for him, under repeated rulings of this Court, previously to allowing defendants' plea of limitation to avail against his claim, to be satisfied that defendants had held *possession* of the lakhiraj land from a period antecedent to 1790 under a *bona fide* title; that the judge had said nothing about their possession, but had only regarded defendants' right, a question with which, in this early stage of the case, he should not have meddled.

"We think that, on the defendants' pleading against the special appellant the statute of limitations, it was incumbent upon the judge first to ascertain whether the defendants, or those from whom they inherited or purchased, had been in possession of the lakhiraj land claimed by them for a period antecedent to the 1st December 1790, under not a valid, but only a *prima facie bona fide* title, in other words a fair title believed to have conveyed a right of possession and property. If the judge were satisfied, from the evidence, of this fact, he should then have looked to the plaintiff's cause of action, have determined when that originated, and have seen whether twelve years had elapsed from that date up to the date of the institution of the suit: if it had, plaintiff is of course out of court; if it had not, the suit should have proceeded on the merits.

"On turning to the decision of the judge, we find it ambiguous, and also defective in the points above noted. We note, moreover, that, though the special appellant sues as dur-mookurrureedur, his title to sue is not questioned. We, therefore, admit the special appeal, to try whether the case should not be remanded for an inquiry conducted in the mode suggested above."

JUDGMENT.

In this case the judge distinctly finds that defendants have proved, through documents filed by them, that the land has been held as rent-free land previous to the 1st December 1790: it is, therefore, rent-free land of a description to which limitation can be applied, unless the plaintiff brings an action within the usual period

prescribed by law. It is not disputed that the present plaintiff has not brought forward his claim within twelve years, but the plaintiff avers that limitation cannot be pleaded at all, because the land was never held as rent-free before the 1st December 1790. On this point, however, the finding of the judge is conclusive; he even refers to the Court's precedent of the 10th September 1855, as bearing upon the question, and as showing that limitation applies to rent-free tenures in existence before 1790. With these facts before us, we see no ground for a remand, and dismiss this appeal, with costs.

THE 23RD FEBRUARY 1859.

H. T. RAIKES and J. H. PATTON, Esqs., Judges, and G. LOCH, Esq.,
Officiating Judge.

Case No. 42 of 1857.

Regular Appeal from the decision of Moulvee Syud Ahmed Buksh, Principal Sudder Ameen of Mymensing, dated 20th November 1856.

Buddeenath Bhattacharj and others, (Plaintiffs,) *Appellants,*
versus

Collector of Mymensing and others, (Defendants,) *Respondents.*

Moonshee Ameer Alee and Mr. R. T. Allan, for Appellants.

Baboo Ramapersad Roy, for the Collector, Respondent, and Baboos Shumbhoonath Pundit, Bhoobunmohun Roy, Kishensukkh Mookerjee, Kishenkishore Ghose, Unnoolapersad Banerjee, and Unokoolchunder Mookerjee, and Moulvee Murhumut Hossein, for the other Respondents.

Suit laid at Company's Rupees 8941.

THIS suit was brought for possession of some seven hundred beegahs of chur land alleged by the plaintiffs to belong to lands which had been at one time submerged by the river Megna, and, having again formed in their original position, constituting a chur called Chur Algee, were at one time resumed by the revenue authorities, but subsequently restored to the proprietors by the special commissioner; after which the defendants had dispossessed the plaintiffs, and annexed the lands to the chur lands of Gopaul Nuviez, which had been settled with the defendants by the Government, and plaintiffs now sued for their recovery.

Appeal dismissed, plaintiffs failing to prove possession of the chur within term of limitation.

The defendants met the suit by a general denial of plaintiffs' claim. And the principal sudder ameen, observing that the permanent settlement made with the defendants dates from May 1843, while the present claim was preferred in May 1854, and that plaintiffs had failed to prove any possession at any previous time, held the law of limitation to be now applicable, and dismissed the suit.

In appeal from this decision plaintiffs' pleader thus explains the circumstances under which their cause of action arose. He states that Chur Algee comprises the lands of several talookdars, whose estates, having been submerged, were re-formed in the position originally occupied by them ; but the collector of revenue resumed the whole chur as a fresh accretion from the river ; and on an appeal being preferred from his decision to the special commissioner, that authority reversed the decree of resumption, and in 1836 restored the resumed lands to the talookdars.

Subsequent to that (namely, in 1843) the defendants entered into settlement with the Government for some chur lands, which the Government held as part of a khas estate, named Gopaul Nuveez ; and in 1844, a person named Ram Manik Ghose having had a dispute with the present defendants for 4 kanees of land and a bhurree, recourse was had to the criminal courts under Act IV. of 1840, which resulted in the rejection of Ram Manik's claim for possession ; but the defendants, under cover of the decision passed on that occasion, dispossessed the plaintiffs of the 700 beegahs now claimed.

In support of their allegations, the pleader informed us, that their witnesses, whose evidence is on record, depose to the fact of their dispossession at the time referred to ; that the decree of the special commissioner shows that the lands of Chur Algee were released from resumption in 1836, and that the plaintiffs were then one of the parties interested in their restoration ; that in 1842 a measurement of the lands subsequently settled with the defendants was made, by which it will be seen what quantity of land the defendants were entitled to hold as belonging to Gopaul Nuveez ; and that other proceedings will satisfy the Court that the defendants have no lands settled with them in Chur Algee, while a reference to the map will show that the lands engaged for by the defendants are separate and distinct from that chur ; so that the defendants could not have acquired possession of the lands in suit, as supposed by the principal sudder ameen, in 1843 ; and, therefore, as plaintiffs were then in possession, the law of limitation cannot now be an obstacle to their present claim.

JUDGMENT.

In the first place we entertain no doubt that the limitation applied by the principal sudder ameen was the general limitation of twelve years. It is from that, he remarks, that no objection had been made to the settlement within three years from its conclusion with the defendants, and that "the inference is irresistible, that the suit is barred by the statute of limitations ;" but the actual facts upon which he eventually grounds his opinion and dismisses the claim are, that "the permanent settlement of the disputed lands was concluded with the defendants in the month of May 1843, and that this suit is instituted

in the month of May 1854, being eleven years from the date of settlement to that of the institution of the suit. Under this circumstance, and on consideration of defendants' former possession and plaintiffs' dispossession from the lands in dispute, it is *prima facie* evident that the statute of limitations has affected the hearing of the suit." These are the words of the translation of the judgment, and clearly indicate that the law of limitation applied is the general law, and not that prescribed by Act XIII. of 1848.

We have to consider then, whether this application of the law is correct.

It has been argued by the pleader for the plaintiffs, appellants, that, although the defendants hold their settlement from 1843, the lands now in suit were not included in it; that plaintiffs held them up to the 17th of May 1844, when defendants violently dispossessed them. It may be granted that, in proof of their dispossession, certain witnesses cited by the plaintiffs were examined, who depose in conformity with the plaintiffs' statement. But upon a point of this nature, and after the lapse of several years, we cannot rely upon oral testimony only, and we are not shown that the plaintiffs took any steps at the time to recover possession, or even to bring the matter to the notice of the authorities, under cover of whose order it is asserted this violent dispossession was effected.

Is there then proof of earlier possession in the plaintiffs, that the Court may infer that they really lost possession in the manner represented by the witnesses?

To show this, we are referred to the special commissioner's decision of 1836, by which it is alleged the lands of Chur Algee, after resumption, were restored to the proprietors; and we are told that among the lands so restored were the lands now claimed by the plaintiffs. But that decree is perfectly useless as establishing any thing in reference to the lands in suit, as it does not suffice to identify the lands in any respect. The decree merely declares that all the lands of the chur, *with the exception of the lands held khas by the Government*, are released from resumption. But the exception of some lands, as khas lands of the Government, shows that the entire lands of the chur were *not* released; and as the reserved lands are those for which the defendants entered into engagements in 1843, it is quite impossible under the general terms of the decree to distinguish between the lands released and those retained by the Government; and we are not referred to any evidence which is, in our opinion, sufficient to identify any of the lands released with those now sued for by the plaintiffs. Plaintiffs' pleader offered to show from the record the *quantity* of land to which the defendants were entitled under the measurement made previous to settlement, but admitted that this would not assist the Court in ascertaining whether the

lands so measured comprised the lands in suit or not ; whereas we found on the record evidence that the plaintiffs had, after settlement, disputed the rights then acquired by the defendants, and accused them of procuring the lands of Chur Algee under the feigned denomination of Magodeeah Mouza *alias* Chur Algee ; and it seems to us most probable that this may be the same dispute which the survey proceedings of 1853 may have reversed, and induced plaintiffs to bring to issue in this action.

Be that however as it may, plaintiffs have not been able to support the depositions of their witnesses on the point of dispossession by any documentary proof, as identifying the lands in dispute with lands in their possession *at any time*. The presumption, therefore, is, that defendants obtained possession under the settlement in 1843, and as the lands purporting to have been the lands settled with them were previously in khas possession of the Government, which dates back more than twelve years, plaintiffs have failed to prove any possession of the lands in suit which can now entitle them to bring an action for their recovery ; and we therefore see no reason to disturb the decision of the lower court, and confirm the same, with costs of this appeal upon the appellants.

THE 23RD FEBRUARY 1859.

A. SCONCE, Esq., Judge, and C. B. TREVOR and H. V. BAYLEY, Esqs.,
Officiating Judges.

Case No. 397 of 1857.

Regular Appeal from the decision of Moonshee Naziroodeen Mahomed Khan, Principal Sudder Ameen of Behar, dated 19th February 1857.

Syed Ameer Alee, (Plaintiff,) *Appellant*,
versus

Baboo Bishen Singh and others, (Defendants,) *Respondents*.

Baboo Shumbhoonath Pundit and Kishenkishore Ghose, for Appellant.

Baboo Ramapersad Roy and Moonshee Ameer Alee, for Respondents.

Suit laid at Company's Rupees 10,000.

Messrs. A. Sconce and H. V. Bayley.—The appellant now before us, holding a lease of mouza Soondhee and other villages, created in his favor by Rajah Modenarain Singh, the proprietor, on the 22nd November 1845, has brought this action to oust defendant, respondent, Bishen Singh, from possession of the same villages, on the plea that his lease had become forfeited under the terms of

A zemindar A first granted a mookurruree lease of certain villages to B, on a written stipulation that, if B became a defaulter to the

the engagement executed by him on the 24th June 1843. Defendant's lease, it will be thus seen, was earlier in date. The engagement taken from him provided for the payment of an annual rent of rs. 2989, and it was stipulated that, if the tenant should fall one instalment in arrear in the payment of his rent, it should be competent to the lessor, the rajah, to appoint a sezawul and attach the lease; and if he should fall three instalments in arrear, it should be competent to the rajah to cause the lease to terminate, and re-settle with others. Subsequently, the rajah executed another lease in favor of plaintiff, at the annual rent of rs. 2300, giving him at the same time an order (tunkha) on the first lessee, Bishen Singh, to pay his rent to plaintiff, together with the kuboolyut executed by Bishen Singh in 1843. Accordingly, plaintiff,—setting forth that he had occasion to institute four successive suits for arrears of rent due by the defendant, that is, one suit for arrears due to the close of 1257, a second to the end of Magh 1258, a third from Phalgun 1258 to the close of that year, and a fourth from the beginning of 1259 (1851) to the close of Kartikh, and that, on the 23rd June 1852, judgment in all these cases was given in his favor,—asserts his right, under the terms of the settlement made by the proprietor with the defendant, to hold the lease forfeited, and to oust defendant from possession.

The principal sudder ameen has dismissed plaintiff's suit, holding that, as the rajah, the lessor, did not expressly assign to plaintiff in his lease the power acquired by himself to declare Bishen Singh's lease forfeited on three months' instalments of rent being overdue, plaintiff was incompetent to exercise that power: hence the present appeal.

For appellant, Baboo Kishenkishore Ghose relies on the obligations incurred by the lessee; and as his argument is more fully brought out by taking it in connection with the pleas adduced in opposition by Moonshee Ameer Aleo for respondent, the latter may be given as follows.

First.—It is contended for respondent, that it was incompetent to the rajah, after creating the (defendant's) respondent's lease, to create a superior lease in favor of plaintiff.

Second.—That the plaintiff is incompetent to declare the lease forfeited, because the exercise of that power was not conveyed to him by his lessor.

Third.—That even as regards the lessor, the condition of forfeiture was a mere threat, not intended to be enforced, and not capable of being enforced, as in the defendant's kuboolyut the rent payable in each instalment was not specified.

arrangement entered into by B, for securing the recovery of his rent, was legally preserved to C as representative of the lessor, and because B had, in writing, recognised that power as being vested in C.

And, *third*, that the forfeiture clause was a substantial condition of B's tenancy, fit to be enforced on the occurrence of the stipulated default.

amount of three instalments of rent, it should be competent to A to cause the lease to terminate. Afterwards A granted another lease of the same villages to C, at a lower rent than the rent payable by B, transferring to C B's kuboolyut, and giving a written order on B to pay his rent to C.

C, showing that the condition of forfeiture expressed in B's kuboolyut had occurred by his default, now sues to set aside B's lease; and it is held, by the majority of the Court, in reversal of the judgment below—

First, that, provided A did not impair the right secured to B, or vary the conditions by which B's tenancy was constituted, it was competent to A, as zemindar, to confer the second lease to C, at his discretion, for the better management of his estate.

Second, that though the power to declare B's lease forfeited was not expressly assigned in C's lease, it was competent to C to exercise that power, both because the ar-

Thus far, then, it will be understood that, upon two very important points, there is no contest. It is not disputed that the verbal condition of the defendant's lease provides that, on the default of defendant for three instalments of rent, the lessor might declare the lease forfeited; nor is it disputed that, by the issue of the suits for arrears preferred by plaintiff, the default contemplated in the lease has actually occurred. Upon these points we have no difficulty. But it is said that the proprietor, the common lessor, having in 1843 given a lease (called a mookurruree) to defendant, could not in 1845 give a second lease of the same villages to plaintiff, so as to place defendant, the first lessee, in a subordinate position to the second lessee. To one portion of this argument we must fully assent. The lessor could not, in any way, by the creation of a second lease, impair the rights secured in the first lease, or vary of his own motion the conditions by which the tenancy of the defendant, Bishen Singh, was constituted. But it seems to us that the assignment of the lessor's right, as landlord, to a third party, by way of subsequent lease, neither does, nor was intended to import any infringement of the rights and conditions of the defendant's covenant. Indeed, no such infraction is asserted. After the plaintiff's lease, as before, the engagement executed in favor of Bishen Singh remained fully in force, with this difference, that the rent payable to the lessor became payable to the second lessee. We have no such statement as that the rajah bound himself not to create a second lease between himself and Bishen Singh; and we do not doubt that, in creating a second mookurruree, at a less rent, in favor of plaintiff, the rajah exercised a discretion legally vested in him as zemindar for the management of his estate. The tenure granted to plaintiff consists of six villages, and it happens that the same six villages compose the defendant's tenure; but it might have been otherwise. It might have been that, instead of one grant to Bishen Singh, six separate leases had been granted to six different persons; and it would have been clearly within the power of the zemindar, in such a case, to bring the six villages within one lease, and assign his interest in the same to a new tenant. The principle of law is obviously the same, whether the zemindar deals with separate villages or with the lands of one village. In this last case, that is, within one village a score of under-tenures variously designated might have been created; and it would still be competent to the owner of the village to lease it, with its engagements, to another tenant.

Next we are told that the plaintiff is incompetent to exercise the power of declaring the forfeiture of the defendant's tenure, because this power was not expressly assigned to him in his own *pot-tah*. But here, we apprehend, the rule to follow is to hold plaintiff to be the representative of the lessor, the zemindar, and to be

legally vested with the authority vested in the zemindar for recovering the rents payable by tenants comprised within the tenure. We can have no question, as already said, of infringing the conditions by which the defendant's tenure was guaranteed to him before the creation of plaintiff's tenure ; and, on the other hand, the conditions which he executed in favor of the zemindar, with the view of securing the punctual payment of his rent, cannot be supposed to have become dormant, because the zemindar substitutes plaintiff for himself as an intermediate tenant through whom the defendant's rent must pass. Besides, that the defendant, Bishen Singh, so understood his obligations, towards the plaintiff, we have the most unexceptionable evidence. In the course of the year 1253, during which the plaintiff's tenure was conferred on him, he had occasion to sue defendant before the collector for rent due. In a petition presented to that officer by the defendant, on the 7th April 1846, he expressly recognised the footing on which he stood towards plaintiff as a tenant ; admitted that he had received the zemindar's order to pay his rent to plaintiff ; and, what for our present purpose is of still more importance, repeated the conditions embodied in his own lease, that, on his falling three instalments of rent in arrear, plaintiff should be entitled to hold his lease to have lapsed, and assume immediate possession of the villages.

Lastly, we are required to consider the condition of forfeiture as infructuous. Now, for the first time, in the course of this action before us, has the objection been taken, that the penalty could not be incurred by reason of the defendant's instalments not being recited in his kuboolyut ; and the objection, it appears to us, is fairly met by Baboo Kishenkishore Ghose for appellant, who argues that, if it had been taken below in answer to the plaint, it would have been satisfactorily accounted for, and that either in the defendant's pottah, which is withheld, or otherwise, the instalments leviable were determined and made known to him. Not only was no objection raised upon this point in the lower court, (a point in itself fatal to the plea,) but in answering the plaintiff's claim for rent in the four suits above adverted to, the defendant was equally silent in this matter. We hold the legal presumption to be, therefore, that defendant was fully cognizant of his monthly liabilities, upon the non-payment of which the condition of forfeiture depended ; and as to the condition itself, it is specific, voluntary, and of the essence of the contract. How much it was needed may be understood from the extent of the defendant's default. Keeping back two years' rent, he drove plaintiff into court four times. We think that we cannot relieve the defendant, respondent, from the penalty of forfeiture ; and we give judgment for appellant, with costs.

Mr. C. B. Trevor.—The plaintiff in this case, Syed Ameer Alee, has sued for the possession of certain villages under a mookurruree hereditary lease, dated the 22nd November 1845, or Aughun 1253, by the reversal of certain orders passed under Act IV. of 1840, both by the magistrate and session judge, and by the cancelment of the mookurruree lease of defendant, in conformity with the conditions of the kuboolyut executed by him to Rajah Modenarain, on the 24th June 1843, and the petition presented to the collector by Baboo Bishen Singh, dated the 7th April 1846.

Plaintiff alleges that Rajah Modenarain Singh granted a mookurruree lease of the villages now in suit to Baboo Bishen Singh, defendant, from the year 1251 F. S., at a fixed annual jumma of rs. 2989, under deeds, viz. pottah and kuboolyut, dated the 24th June 1843, corresponding with 12th Assin 1250, on condition that, if three instalments be not paid, the lease shall become null and void, and the rajah shall be empowered to re-settle the mehals with any party whom he might select for that purpose; that the defendant from the beginning of 1251 took possession of the villages, but failed to pay the stipulated rent; that a summary suit was consequently brought by the rajah against the defendant for the arrears, and for the restoration of the property into his own possession, and he obtained a decree on the 1st February 1845; that, subsequently, the rajah permanently leased out the villages to him, plaintiff, at a fixed rent of rs. 2300, under a mookurruree pottah dated in the month of Aughun 1253, and delivered to him the kuboolyut, which was executed by Baboo Bishen Singh, and also a written order, directing defendant to pay to him the rents of the villages in hire; that defendant, nevertheless, withheld payment; that he, plaintiff, consequently instituted a summary suit, during which defendant appeared as a supplicant before petitioner, paid the arrears due, and filed on the 7th April 1846 a deed of compromise, admitting the justice of the claim, and promising in future to pay his rents according as the instalments became due, and stating that, in case of failure, plaintiff would be authorised to realise the rent by the sale of defendant's property, by arrest of his person, or by taking actual possession of the villages; that, accordingly, the suit was decided on the 8th April 1846; that defendant then paid his rents regularly up to the instalment of Phalgun 1250, but, from that of Cheyt 1256 he failed to pay, and was again sued, but, promising to pay, the case was amicably settled; that defendant again failed to act up to his promise, whereupon petitioner filed two separate plaints in the civil court for the rents due from Aughun to the end of 1257, and also those due from Assin to Magh 1258, and two summary suits for the arrears due from Phalgun to the end of 1258, and also from the instalment of Assin to that of Kartik

1259 ; that the two latter cases were called up from the collectorate, and all decided in the plaintiff's favor on the 23rd June 1852 ; that petitioner then, in accordance with the provisions of the circular order dated the 4th August 1847, construction No. 1331, and Regulation VIII. of 1819, Section 18, annulled the istemraree pottah of defendant, and deputed an ameen to take possession ; that the defendant opposing him, a suit was instituted by him under Act IV. of 1840, but his claim was dismissed, both by the magistrate and the session judge ; that, seeing no other means of obtaining his rights, which appertain to him both in virtue of the kuboolyut executed by Bishen Singh, defendant, in favor of Rajah Modenarain, and his own deed of compromise, dated the 7th April 1846, he brings his present suit for possession of the villages included in his mookurruree lease by the eviction of the defendant.

The defendant, Bishen Singh, the principal defendant, in his answer, amongst other things, pleads that it was not competent to Rajah Modenarain to execute a second mookurruree lease in plaintiff's favor of the same property, without having first annulled that which existed in defendant's name ; that, under the terms of the pottah given to plaintiff by the rajah, admitting it to be a valid deed, there is no power given to him of ousting defendant from the mookurruree, and that the ikrarnamah, or deed of compromise, dated the 7th April 1846, is not a genuine document, defendant being ignorant of its existence, and being in another country at the time, and it must have been concocted by plaintiff, who was the serishtadar of the collectorate, and had great influence in the office ; that, consequently, the present claim, being for possession by the annulment of his mookurruree lease, is absurd, and should be dismissed.

The principal sudder ameen, after remarking that the deed propounded by plaintiff is genuine, and that under it the plaintiff had a right to receive the rents as they became due from defendant, proceeds thus :—" On considering the tenor and language of the pottah in favor of the plaintiff, I am of opinion that the proprietor did not invest plaintiff with the right and power to set aside the lease of defendant. Had he done so, he would of course have inserted such a power in the lease. Although the kuboolyut of defendant in favor of the proprietor stipulates that the lease becomes voidable if three instalments remain in arrear, and this kuboolyut has been transferred to the plaintiff, still the conditions of that deed cannot be enforced between plaintiff and defendant, but only between the contracting parties, the defendant and the proprietor. Moreover, it appears that the proprietor entrusted the kuboolyut to plaintiff merely with a view to supply the latter with specific data as to the rent payable by defendant, so that, in the event of defendant's denial of the amount and rate of rent due from him, plaintiff might have no difficulty in producing the document. With reference to plain-

tiff's allegation, that he is the representative of the owner, the court holds that he is so only as regards the realisation of the rent from defendant, but not so in reference to the annulment of the pottah and the attainment of actual possession. The admission of the power to annul the pottah for default to pay three instalments due by defendant, in his petition of compromise filed in the summary suit, cannot be reckoned as a document whereupon the claim can be founded, because it is opposed to the pottah granted in favor of plaintiff." The principal sudder ameen, consequently, dismissed plaintiff's claim, with costs.

From the decision of the principal sudder ameen an appeal has now been preferred to this Court by the plaintiff below.

The main facts of the case, as admitted by both parties, are, that Rajah Modenarain Singh, on the 24th June 1843, or 12th Assin 1250 F. S., granted a mowroosee mookurruree lease to the defendant in this suit, at the yearly rent of rs. 2989, and he reserved to himself the right of sending a sezawul to collect the rents in case one instalment should be in arrear, and in case three instalments should remain unpaid he was at liberty to cancel the lease. It appears that arrears occurred, summary suits were instituted and decreed against defendant, but the zemindar did not exercise the power reserved to him of cancelling defendant's lease; that in Aughun 1258 or 22nd November 1845 the rajah granted a lease to the plaintiff in this case. The lease granted is one in exactly the same terms as that granted to the defendant. It reserves the same power as to the cancelment of the mookurruree lease then granted, but gives no power to the plaintiff to cancel the defendant's lease, and makes no mention of the defendant's lease of the very same nature for the very same villages, but commends the tenants of all sorts to the good will of the mookurrureedar. And under this lease plaintiff instituted several summary and regular suits against the defendant, some of which were compromised and some decided against him. In none of these does it appear that defendant questioned the power of the zemindar to grant plaintiff's lease, but, in one, it appears, defendant filed an ikrarnamah, in which he, through his mookhtars, acknowledged that the observance of the conditions inserted in the kuboolyut, which he executed in favor of Rajah Modenarain, and which the rajah has transferred to Syed Ameer Alee, are obligatory on him, and that, in the event of non-payment and default of three instalments, the mookurruree lease granted to him at once becomes null and void, and plaintiff, Ameer Alee, is entitled to direct possession. As at the present time decrees to more than the amount of the instalments are standing against defendant, the plaintiff sues for possession by the cancelment of defendant's mookurruree lease.

On these facts it has been contended on behalf of the appellant, by Baboo Kishenkishore Ghose, that it was quite competent to Rajah Modenarain to create a mookurruree lease between the defendant, tenant, and himself, as owner of the property ; that, in creating the same, and in directing the defendant to pay the rents to the plaintiff, the very contract which formerly existed between the rajah and defendant now exists between the plaintiff and the defendant ; that, consequently, as defendant has been adjudged to be in arrears, the plaintiff is entitled, under his lease and the kuboolyut of the defendant, to possession of the tenure ; that, moreover, by the ikrarnamah filed by the defendant in the summary suit, and dated the 7th April 1846, he has recognised the power to evict him after three instalments have been adjudged to be in arrear ; and, consequently, irrespectively of plaintiff's pottah, he, by that deed, has estopped himself from questioning the power which he has once admitted to belong to the plaintiff.

On the part of defendant, respondent, it is urged that it was not competent to the zemindar to grant to the plaintiff a mookurruree lease of the nature of that now set up—one in its nature identical with that previously granted to him, and not annulled by the zemindar ; that, doubtless, it was in the power of the zemindar to have assigned his rights as zemindar to any person as farmer or putneedar, but in the present instance there is not an assignment of zemindaree right by the creation of a new intermediate tenancy of the same nature with that held by defendant ; that, granting the legality of plaintiff's lease, and looking even to its terms, it will be found that the power of cancelling defendant's lease was not given to him by the zemindar, and, consequently, the relation between plaintiff and defendant is not identical with that which existed between the zemindar and himself ; that the ikrarnamah filed by plaintiff, dated the 7th April 1846, is not a genuine document, but, even if it were, such a deed, considering the defect of power in the plaintiff, would be ineffectual to give plaintiff a power which he has not derived from the owner of the property ; that, consequently, the decision of the court below should be affirmed.

The points which, on the facts of the present case, call for determination, are :

First.—Whether, under the circumstances of this case, the lease granted to plaintiff by the zemindar is a valid one in law or not ?

Second.—If it be, whether plaintiff, under that lease, or the kuboolyut executed by plaintiff to the zemindar, or the ikrarnamah executed by plaintiff, dated the 7th April 1846, has under certain circumstances the power to cancel the hereditary mookurruree lease of the defendant ?

Third.—If he has, whether those circumstances have arisen or not ?

It seems to me that there can be no question as to the genuineness of all the chief documents filed in this case, that is, of the lease of the plaintiff granted to him by the zemindar, the kuboolyut executed by defendant to the zemindar, and the ikrarnamah executed by the defendant, through his mookhtars, Luchmunpersad and Doodraj Singh, on the 7th April 1846. It only remains then to determine the points of law raised in the first and second issues, and to determine the third issue in accordance with the result come to on the previous ones.

Looking to the first issue, it appears to me not open to question, that a zemindar can assign by lease any portion of the zemindaree profits which he may be entitled to receive from his tenant in chief, to any other party, as ijaradar, putneedar, or any other holder, who receives the same as portion of the zemindaree profits, though under a particular tenure; but it is not competent to a zemindar to execute between the tenant in chief and himself, out of the zemindaree profits, a tenancy of the very same nature with that of the tenant in chief, and thus render him an inferior tenant when he formerly was the superior; and this incompetency seems to have occurred to the grantor of the lease to the plaintiff in this suit, for in it no mention is made of the lease previously granted to the defendant, but the plaintiff is to collect from the ryots, as if the grantee had considered the previous lease annulled, which admittedly was not the case. It is, however, unnecessary to follow this point further, for the defendant, in the present case, is estopped from pleading it with effect. He has by voluntary payments and by his own proved ikrarnamah, dated the 7th April 1846, acknowledged both the zemindar's power and right to grant a lease to the plaintiff, and has by acts also admitted it. It is consequently now too late for him to raise a valid legal objection to that which he has once deliberately admitted.

Turning then to the second issue, it is to be observed that both the parties before the Court hold their lease from a third party, the zemindar. The powers granted to the plaintiff must, consequently, be limited and controlled by the terms of his pottah, and the liability of the defendant be regulated by the kuboolyut; and neither the one nor the other can be varied without the assent of the zemindar. Now, on perusing the pottah of the plaintiff, it will be observed that it gives him no power to cancel the mookurruree lease of the defendant under any circumstances, though in it the zemindar reserves full power to himself to cancel that of the plaintiff under certain circumstances. In the face of this silence on the point, it seems to me, on principle, that plaintiff must be considered to be vested with only the ordinary and usual power of mookurrureedar, that is, with the power of bringing the dur-mookurruree tenure, which, in fact,

that of defendant has become, to sale for arrears, and not to be vested by implication with the extraordinary power, which the zemindar originally reserved to himself as against the defendant, but which he has not seen fit expressly to grant to the plaintiff in this suit. But it has been argued that the defect of power in the plaintiff has been cured by the acquiescence of the defendant, as evidenced by the ikarnamah executed on his behalf in April 1846. This argument would, doubtless, hold, were the plaintiff vested with all the zemindaree powers, but, as before observed, the power granted to plaintiff by the zemindar is limited. It does not include the right to cancel the dur-mookurruree of the defendant, and plaintiff, consequently, has no right himself, nor can an under-tenant give himself authority to exercise, without the consent of the zemindar, a special right with which he has not been vested by the superior holder, though, as against the defendant, the superior holder, previous to the creation of plaintiff's tenure, might have exercised it ; and it only remains for the plaintiff, appellant, in this suit, to realise his due from the defendant in the ordinary mode, *viz.* by the sale of his tenure.

Under the view of the case expressed above, it becomes unnecessary to enter into a consideration of the third issue raised. I would dismiss the appeal, and affirm the decision of the lower court, with costs.

THE 23RD FEBRUARY 1859.

H. T. RAIKES and J. H. PATTON, Esqs., Judges, and G. LOCH, Esq.,
Officiating Judge.

Regular Appeals from the decision of Baboo Roy Ramlochun Ghose, Principal Sudder Ameen of Nuddea, dated 19th January 1857.

Case No. 300 of 1857.

Madhub Chand Roy, (one of the Defendants,) *Appellant,*
versus

Prosunno Chand Roy, (Plaintiff,) and others, (Defendants,)
Respondents.

Baboo Ramapersad Roy, Kishenkishore Ghose, and Poorunchunder Roy, for Appellant.

Baboo Shumbhoonath Pundit and Bhoobunmohun Roy, for Respondents.

Case No. 940 of 1857.

Prosunno Chand Roy, (Plaintiff,) *Appellant,*
versus

Madhub Chand Roy, (Defendant,) *Respondent.*

Baboo Shumbhoonath Pundit and Bhoobunmohun Roy, for Appellant.

Baboo Kishenkishore Ghose and Poorunchunder Roy, for Respondent.

Suit laid at Company's Rupees 19,796-3a.-17g.-3c.

Plaintiffsought to recover possession of a share of certain putnees and an indigo concern. As the evidence adduced by him to prove that he had purchased the property, had been in possession, and had been ousted, was considered insufficient, his claim was rejected, and the order of the lower court reversed.

THE parties in this suit are brothers. The property in dispute consists of one-third of an 8-anna share of mouzas Kalipoor, &c., in turuf Sookhsaugor, belonging to Nokoomunee Debea, one-sixth of the same property belonging to Kaleedass Bhattacharjea, and the Sookhsaugor indigo concern. The plaintiff alleges that, on 27th Cheyt 1257 B. S., he and his brother took a putnee of the property above mentioned, belonging to Nokoomunee, and paid the price from their separate funds, rs. 3500. The putnee lease was drawn out in the names of Hurejeebun Mookerjea, the relative and servant of plaintiff, and Dinonath Mookerjea, the relative and servant of the defendant, and the litigants in the present suit each held an 8-anna share therein, under the names of their respective adherents. On 27th Assin 1258 B. S., the parties, in a similar manner, under the same names, took a putnee of the property of Kaleedass Bhattacharjea, for which they paid from their respective funds rs. 1750, and on 9th Assar 1260, they jointly purchased the Sookhsaugor indigo concern, from the Bengal Indigo Company, for rs. 6300, for which they paid from their respective funds, each party having a half share in it. The parties advanced funds according to their respective

shares to carry on the indigo concern, and in the season of 1260-61 about 140 maunds of indigo were manufactured, which, owing to disputes between the plaintiff and defendant, were taken possession of by the latter, and taken to Calcutta and sold, defendant appropriating the whole of the profits to himself, while he also deprived plaintiff of his possession in the putnees, and of his share in the indigo concern, asserting that plaintiff had, on 12th Pous 1261, sold his share, amounting to $2\frac{1}{2}$ annas, though in reality it is 8 annas, in the concern, to the defendant; and he now sues to recover possession of his share of the putnees, with mesne profits, and in the indigo concern, and to obtain a share of the profits arising from the sale of the indigo and the value of certain property appertaining to the said concern, which the defendant has misappropriated.

It is contended by the defendant, that plaintiff never had a share in the putnees; that Dinonath took half in his own name, and defendant took the other half in the name of Hureejeebun Mokerjea, and subsequently took the share of Dinonath in farm, and is now in sole possession. Plaintiff and defendant purchased the Sookhsaugor indigo concern, and plaintiff's share, though not so stated in the bill of sale, was $2\frac{1}{2}$ annas, and that of the defendant $13\frac{1}{2}$ annas, and they paid for the concern in these proportions; that the season of 1260-61 turning out unfortunately, and plaintiff being unwilling to incur further expense in manufacturing indigo, did on 12th Pous 1261 sell to defendant his share in the indigo concern for rs. 2907, having in the previous year given an ikrar, dated 30th Cheyt 1260, pledging his share of the concern, therein stated to be $2\frac{1}{2}$ annas, to defendant, in consideration of advances made by defendant for their mutual benefit in carrying on the concern; that a loss was incurred on the indigo manufactured in 1260-61; the quantity manufactured was 155 *mds.*-22*s.*-5*c.*, which, after deducting brokerage and commission, yielded a net sum of rs. 19,905-1; but the cost of production was rs. 23,214-1.

The principal sudder ameen has given plaintiff a decree for the share in the putnees claimed by him, with wasilat, and also an 8-anna share in the indigo concern; but has rejected his claim to the value of indigo and other property alleged to have been appropriated by the defendant.

Two appeals have been preferred from this decision, the defendant seeking to set aside that part of the order of the lower court which affects him, and the plaintiff to obtain the value of the indigo and other property, which claim had been disallowed.

It is urged by the defendant, appellant, that as he is in possession of the whole property, and as Hureejeebun Moorkerjea, through whom plaintiff claims the half share of the putnees, admits that he was never in possession, plaintiff was bound to prove not only his right to the property, but also his possession and subsequent dispossession;

that he has produced no documentary evidence to prove his right or possession; and of the large number of witnesses cited by him, the lower court has rejected, as tutored, all but two, *viz.* Hureejebun Mookerjea and Tarapersad, and these being relatives of the plaintiff, have colluded with him. To prove his right to a share in the putnees, plaintiff was bound to show that the share he claimed was paid for from his own funds; and till this were clearly made out, the defendant's possession could not be disturbed, nor could he even be called upon to prove his case. Had plaintiff really paid for the putnee out of his own funds, he could produce his accounts or show whence he obtained the money and by whom it was paid; but the only evidence on which the principal sudder ameen has relied is the testimony of the two witnesses abovementioned, who allege that plaintiff paid the purchase-money, but, when further examined, admit that it was not paid in their presence, and give any thing but a satisfactory account of the affair. The documents filed by the plaintiff to prove possession, *viz.* an amulnamah and some dakhilas, have not, as acknowledged by the principal sudder ameen, been attested, and yet he admits them without proof as genuine, though the defendant objects to them. Then as regards the plea of ejectment, had plaintiff been ejected, as he asserts, would he not have made some application to some of the authorities in the two districts of Hooghly and Nuddea? Ejectment from a large estate and a concern comprising several factories could not have been accomplished by mere word of mouth; it must have been accompanied by some overt act; and it is improbable that plaintiff should, without a word, submit to be deprived of so much valuable property. As regards the indigo concern, the principal sudder ameen, on account of there being no specification of shares in the bill of sale, assumes that plaintiff and defendant held equal shares; and though plaintiff has failed to prove, which he was bound to do, that he purchased and paid for an 8-anna share in the concern, yet the documentary evidence filed by the defendant, *viz.* the ikrar given by plaintiff in 1260, and the deed of sale of 1261, which have been attested by witnesses, and the accounts of the factory, also attested by the writer, clearly show that plaintiff held only a $2\frac{1}{2}$ annas share in the concern, and that his advances for carrying it on during the season of 1260-61 were in proportion, and that the sum actually paid by him for his share corresponded to the extent of that share.

In this case the parties have adduced a great quantity of oral evidence, which, with the exception of that of three or four persons, has been rejected by the principal sudder ameen as unworthy of credit. Of the witnesses whose evidence has been accepted are two for the plaintiff, respondent, *viz.* Hureejebun Mookerjea, one of the parties in whose name the putnee was taken, and Tarapersad, a relative of the litigants; and it is mainly on the evidence of these witnesses the

decision of the lower court is based. Both witnesses depose that the putnees were taken by the litigants jointly, and that they held possession of equal shares, and paid for the same from their respective means; that they likewise purchased the indigo concern, each having an 8-anna share, for which each party paid respectively, and advanced for the cultivation and manufacture of indigo in 1260-61 in proportion to their shares; that defendant, being the elder brother, had the management of the putnees and indigo concern, and, consequently, the title-deeds were consigned to his keeping as well as the receipts for rent paid to the zemindars. Hureejebun deposes further that, being a relative and servant of the plaintiff, his name was made use of by plaintiff in taking the putnees, as that of Dinonath was by the defendant; that plaintiff got possession, paid rents to the zemindar, and was in the enjoyment of his share of half the putnees and indigo concern till ousted by the defendant. The evidence of these two witnesses, which the Court is asked to accept, is, on examination, of too general a character to be admitted as conclusive without further corroborative evidence. We admit that the statement of Hureejebun, that his name was made use of by plaintiff, is of considerable weight in the plaintiff's favor; but when examined as to other points, on which he declares himself to be equally cognizant, his evidence breaks down, and amounts either to mere assertion, or tends to support the defendant's case. For instance, this witness asserts that the litigant parties paid each for his own 8-anna share of the putnees. On further examination he admits that Madhubchunder was alone, present when the money for the putnees taken from Nokoomunee was paid; and he says, "who gave the money to Tarapersad, whether Madhubchund or Ramtunnoo Bhuttacharjea on the part of the plaintiff, I cannot say." The witness admits that he was not present when the money for the putnees taken from Kaleedass was paid, nor did he see plaintiff make over the price to Ramtunnoo Bhuttacharjea on the former occasion, but he saw Ramtunnoo go for the money, and that individual showed him a quantity of bank notes and cash. Now Tarapersad distinctly says that he received the price of the putnee from Madhubchund, the defendant. Both the above witnesses depose to the plaintiff being ousted by defendant in 1262, but are unable to state any particulars of the disputes which led to that act, or how it was effected. The only documents filed by plaintiff to prove possession of the putnee are an amulnamah and two or three dakhilas, which have not been attested, but which the principal sudder ameen has admitted as genuine without any proof; but if, as deposed to by the two witnesses, on whose evidence the lower court has placed such reliance, the plaintiff paid for the putnee from his own funds, and, according to Hureejebun, also paid rents to the zemindar, he must surely have some accounts in evidence of such payments, or might

have shown from what source he obtained the money, and through whom he paid it to the zemindar. In the absence of such documentary evidence to corroborate the testimony of the two witnesses above mentioned, we cannot admit their evidence, general and somewhat contradictory as it is, as a conclusive proof of the plaintiff's right to the putnees.

As regards the indigo concern, the presumption arising from the deed of sale showing no specification of shares is in plaintiff's favor ; and it remains to be considered whether the evidence produced by the defendant to rebut that presumption is sufficient to throw the burden of proof on the plaintiff, and, if so, whether he has adduced any sufficient evidence to support his claim. It is alleged by defendant that plaintiff's share in the indigo concern was $2\frac{1}{2}$ annas, and in proof of this he has filed an ikrarnamah, dated 30th Cheyt 1260, executed by plaintiff, authorising the defendant to carry on the concern, and in which he states his share to be $2\frac{1}{2}$ annas, and promises to make advances in proportion to his interest, also a deed of sale alleged to have been executed by plaintiff on 12th Pous 1261, disposing of his share in the concern to the defendant. The defendant further produces his accounts, which show the sums received by him from the plaintiff on various dates, and also the amount paid to plaintiff as purchase-money of his share. These documents and accounts have been attested by the subscribing witnesses and writers ; and though the documents are repudiated by the plaintiff, and the accounts alleged to be collusively prepared, yet we find no sufficient grounds for questioning the validity or genuineness of either, for, independent of the evidence of the attesting witnesses, we think it highly improbable that the defendant, if he wished to commit fraud and forgery, should, as it were, multiply proofs against himself by first drawing up an ikrar, and some months after a deed of sale, the burden of proving which documents would fall on him ; when he might, without difficulty, have assumed the plaintiff's share in the concern to be 8 annas, so as to be in unison with the terms of the bill of sale, and drawn up a single deed, *viz.* a bill of sale for the whole of plaintiff's share. As regards the accounts, nothing is shown us how they have been collusively prepared. No doubt accounts can be cooked to any extent, but where everything appears straightforward, it remains with the party making the assertion to show in what respect they are collusive. Now, to meet this evidence for the defence, what does the plaintiff adduce to prove that his share is a half of the concern, and that he paid for it from his own funds, and contributed advances in proportion to carry it on ? With the exception of the evidence of the two witnesses noted above, plaintiff has given no reliable proof ; and the evidence of these two witnesses amounts merely to an assertion, for neither of them was present when the earnest

money, or the remainder of the purchase-money, was paid ; and their statements tend to support the claim of the defendant, that he purchased the plaintiff's share of the concern, for they admit that in 1261 there were negotiations between the parties for the sale of plaintiff's share. Had plaintiff, as he and his witnesses aver, paid the price for the half share of the concern, and made advances in proportion, he could surely have produced accounts in support of his allegations ; but in the absence of any such reliable documentary evidence to corroborate the evidence of the witnesses, we do not think that evidence sufficient to rebut the statement of the defendant, which he has satisfactorily proved. Under these circumstances, as we do not find that the plaintiff has proved his case, we reverse the order of the lower court, and decree the appeal of the defendant, Madhubchund, with costs. We also dismiss the appeal of the plaintiff, with costs.

THE 23RD FEBRUARY 1859.

H. T. RAIKES and J. H. PATTON, Esqs., Judges, and G. LOCH, Esq.,
Officiating Judge.

Case No. 277 of 1858.

Special Appeal from the decision of Syud Ahmud Buksh, Principal Sudder Ameen of Mymensing, dated 5th November 1857, affirming a decree of Baboo Bystubchurn Dass, Moonsiff of Neeklee, dated 30th May 1857.

Musst. Azeezunissa Beebee and others, (Defendants,) *Appellants,*
versus

Rajkanth Surma, (Plaintiff,) *Respondent.*

Moulvee Aftabodeen Mahomed, for Appellants.

Baboo Dwarkanath Mitter, for Respondent.

THIS case was admitted to special appeal on the 26th April 1858, under the following certificate recorded by Messrs. B. J. Colvin and A. Sconce.

"Petitioners are defendants in a suit brought by plaintiff, special respondent, for the reversal of settlement of a resumed talook made with them ; and it is said that a decree has been given against them, not for the reversal of the settlement of the talook, as prayed for, but in recognition of special respondent's shikmee tenure therein, which, it is urged, is contrary to the plaint.

"We admit the special appeal to try the point."

JUDGMENT.

On reference to the plaint, we find that the Court has been misled by the vakeel for the petitioners. The plaint seeks first the

Appeal dismissed, as the point taken when the special appeal was admitted does not arise from the proceedings.

reversal of the settlement made with the defendants, and the recognition of the rights of the plaintiff as shikmee talookdar. The lower courts have rejected the first prayer, but have allowed the second, and the decision is, consequently, not inconsistent with the plaint. We dismiss the appeal, with costs.

THE 23RD FEBRUARY 1859.

H. T. RAIKES and J. H. PATTON, ESQS., Judges, and G. LOCH, ESQ.,
Officiating Judge.

Case No. 349 of 1858.

*Special Appeal from the decision of the Honorable R. Forbes,
Judge of Tirhoot, dated 29th December 1857, affirming a
decree of Syud Alee Hossein, Moonsiff of Muhooa, dated
27th May 1857.*

Beharree Myeto, (one of the Defendants,) *Appellant,*
versus

Kassee Myeto and others, (Plaintiffs,) and Boderam Myeto and others,
(Defendants,) *Respondents.*

Baboo Jugdanund Mookerjee, for Appellant.

Baboo Kishensukha Mookerjee, for Kassee Myeto.

Moulvee Ahmed Alee, for Khemchand.

*Vide prece-
dent cited.*

THIS case was admitted to special appeal on the 7th June 1858, under the following certificates recorded by Messrs. B. J. Colvin and A. Sconce.

Mr. B. J. Colvin.—"Petitioner's appeal has been rejected by the judge, as he did not prefer his grounds of objection to the decision of the lower court within thirty days. I admit this appeal, as others, Nos. 2 and others of this year, have been admitted to try the correctness of similar orders."

Mr. A. Sconce.—"The petitioner, it appears to me, shows no good ground in this case; but similar cases have been admitted, by which this order should be disposed of."

JUDGMENT.

This follows the precedent laid down in the case of Hubeeboonissa, of 10th August 1858. We remand the case to the lower appellate court for decision on the merits.

THE 23RD FEBRUARY 1859.

H. T. RAIKES and J. H. PATTON, Esqs., Judges, and G. LOCH, Esq.,
Officiating Judge.

Case No. 339 of 1858.

*Special Appeal from the decision of Mr. W. Wright, Principal
Sudder Ameen of Bhagulpore, dated 11th December 1857,
affirming a decree of Baboo Anund Misser, Sudder Moonsiff
of that district, dated 6th February 1854.*

Syud Irshad Hossein, (Plaintiff,) *Appellant,*
versus

Government and others, (Defendants,) *Respondents.*

Moulvee Aftaboodeen Mahomed, for Appellant.

*Moonshee Ameer Alee and Moulvee Murhumut Hossein, for Prem
Lall and Teeluknath Lall, two of the Respondents.*

THIS case was admitted to special appeal on the 21st May 1858, under the following certificate recorded by Messrs. B. J. Colvin and A. Sconce. *Vide* prece-
dent cited.

“Petitioner, plaintiff, dissatisfied with a decree in rejection of his claim, dated the 6th February 1854, appealed on the 6th March following, but the appeal has been dismissed by the principal sudder ameen agreeably to the precedent of 8th January 1857, as the grounds of appeal had not been filed within the month. It is stated that several appeals have been admitted, to try the correctness of striking off appeals for the above reason ; and we admit this appeal to be tried with them.”

JUDGMENT.

This follows the precedent of the 10th August 1858, as laid down in the case of Hubeeboonissa. We remand the case to the lower appellate court for a decision on the merits.

THE 23RD FEBRUARY 1859.

H. T. RAIKES and J. H. PATTON, ESQS., Judges, and G. LOCH, Esq.,
Officiating Judge.

Case No. 270 of 1858.

*Special Appeal from the decision of Syud Ahmed Buksh,
Principal Sudder Ameen of Mymensing, dated 4th November
1857, reversing a decree of Baboo Ramdoollub Dass, Moon-
siff of Jamalpore, dated 20th May 1857.*

Sheikh Lal Mahomed, (Plaintiff,) *Appellant*,
versus

Bishennath Augustee and others, (Defendants,) *Respondents*.

Baboo Kishensukha Mookerjee, for Appellant.

Baboo Ramapersad Roy and *Mr. R. T. Allan*, for Bishennath
Augustee, Respondent.

Plaintiff received a pottah for certain lands from A and sowed them. A dispute arose between A and B for the lands, and the possession was awarded to B under Act IV. of 1840, who reaped the whole crop. Plaintiff sued to recover the value of the crop, but the principal sudder ameen rejected the claim, because plaintiff had not also sued for the reversal of the decision under Act IV. of 1840.

Held that, as plaintiff was no party to that suit, and claimed to recover the value of his crops only as a ryot, and did not assert any proprietary right, it was unnecessary for him to sue to reverse the award under Act IV. of 1840.

THIS case was admitted to special appeal on the 22nd April 1858, under the following certificate recorded by Messrs. B. J. Colvin and A. Sconce.

"Petitioner was plaintiff for value of crops. It seems that the land on which they stood had been the subject of an Act IV. of 1840 case, and had been made over to special respondents. Petitioner appeared as a third party, claiming the crops as sown by him, but his claim was rejected. He therefore instituted this suit, and got a decree in the first court; but the principal sudder ameen reversed the judgment, as the suit should have been for the land by reversal of the Act IV. of 1840 order. It is urged in special appeal, that the point for decision in this case was only whether petitioner sowed the crops, as he, being a ryot, had no claim to the land, but only for the value of the crop. We admit the special appeal to try the point."

JUDGMENT.

The plaintiff, petitioner, sued to recover the value of crops sown by him on certain lands, which were subsequently awarded under Act IV. of 1840. To this case plaintiff was not a party; and the defendants, on obtaining possession, appropriated the crop. Plaintiff, on the plea that he was the occupant ryot, sued to recover the value of the crop sown by him, and obtained a decree in the moonsiff's court. On appeal by a ryot who claimed to hold the land from the defendants, the principal sudder ameen determined that a suit for the value of the crop could not be entertained unless plaintiff also sued to reverse the order under Act IV. of 1840, and he dismissed the plaintiff's claim.

We think that the Act IV. case, to which plaintiff was not a party, gave the defendants right of possession as proprietors as against the opposite party in that case, from whom the plaintiff held the land.

As plaintiff claims to hold only as a ryot, and asserts no proprietary right, it was unnecessary for him to sue to reverse the Act IV. decision; and we therefore remand the case to the principal sudder ameen, to determine the real point at issue, whether plaintiff can claim the compensation he demands, or whether the defendants were, under the decision of the Act IV. case, entitled to the crops.

THE 23RD FEBRUARY 1859.

A. SCONCE, ESQ., Judge, and C. B. TREVOR and H. V. BAYLEY, ESQS.,
Officiating Judges.

Case No. 492 of 1858.

Special Appeal from the decision of Mr. A. Davidson, Principal Sudder Ameen of Midnapore, dated 29th January 1858, modifying a decree of Baboo Womeshchunder Mookerjee, Moonsiff of Gurhberhe, dated 14th March 1857.

Salgram Bhuggut, (one of the Defendants,) *Appellant*,
versus

Sreedhur Paul, (Plaintiff,) and Gooroochurn Dey, (another Defendant,) *Respondents*.

Moulvee Aftabodeen Mahomed, for Appellant.
Baboo Taruknath Sein, for Respondents.

THIS case was admitted to special appeal on the 3rd August 1858, under the following certificate recorded by Messrs. C. B. Trevor and H. V. Bayley.

"Plaintiff sued to recover a share of a tank, valued at rs. 122-6-0, and fish appropriated by defendant, valued at rs. 14 = rs. 137-6a. Plaintiff alleged that he had been ousted by defendant, as purchaser of a share sold in satisfaction of a decree against another sharer, the purchaser's judgment debtor. The moonsiff decreed the claim with the wasilat sued for.

"The defendant appealed as to the fact of the judgment debtor's alleged share in the tank, and generally on the merits of the case. The principal sudder ameen found that the judgment debtor was a sharer, but as to the exact amount of his share he writes—'There is no satisfactory evidence by which their several shares can be known, save the bond filed and executed by partners.' He goes on to say that he sees no reason to doubt its correctness; and finds that by it the judgment debtor's share was one-sixteenth. He decrees the appeal as to that share, and confirms the sale of that portion. He also decrees wasilat.

"The defendant appeals specially, urging:

I. That the bond was not sufficient to prove the judgment debtor's share to be one-sixteenth.

Held, that the enquiry of the principal sudder ameen as to the amount of wasilat due to plaintiff is defective. As, however, the plaintiff has consented to give up his wasilat altogether, the order of the lower court, so far as it decrees wasilat, is reversed, with costs in proportion to the amount decreed.

II. That there should have been an investigation as to whether the value of fish appropriated was rs. 14, before giving that sum as wasilat.

"On the *first* point, we are of opinion that it is one of evidence, and not open to our consideration on this special appeal. But we admit the special appeal, to try whether the case should not be remanded for an investigation upon the *second* point."

JUDGMENT.

There can be no doubt that the enquiry of the principal sudder ameen, as to the amount of wasilat due to plaintiff, is defective. As, however, the plaintiff has consented to give up his wasilat altogether, rather than the case should go back, we modify so much of the order of the lower court as decrees wasilat, and decree this special appeal, with costs calculated on the wasilat disallowed.

THE 23RD FEBRUARY 1859.

A. SCONCE, ESQ., Judge, and C. B. TREVOR and H. V. BAYLEY, Esqs.,
Officiating Judges.

Case No. 537 of 1858.

Special Appeal from the decision of Captain E. A. Rowlatt, Principal Assistant Commissioner of Kamroop, dated 29th March 1858, reversing a decree of Baboo Juggno Dutt Burkut-kee, Moonsiff of Rungeah, dated 19th December 1857.

Dhurrum Dey Goshayen, (Defendant,) Appellant,
versus

Bhortboeah Kyburt, (Plaintiff,) Respondent.

Baboos Poorunchunder Roy and Bungsheebuddun Mitter, for Appellant.

Baboo Obhoychurn Bose, for Respondent.

THIS case was admitted to special appeal on the 26th August 1858, under the following certificate recorded by Messrs. C. B. Trevor and H. V. Bayley.

"Plaintiff, who is a Bhukkut of the Buddeah Shustur, complained that the defendant, petitioner, had ousted him from 3p. 2dr. of land, of which he and his ancestors have been in possession from time immemorial. Defendant acknowledges having ousted plaintiff, and asserts that the land claimed is not a portion of that to which the principal plaintiff is entitled for the performance of service at the Shustur, whether the land in dispute was plaintiff's service land, or land which he had leased from the defendant, not being fully adjudicated, case remanded, in order that the principal assistant commissioner might investigate whether any ticca lease, and for what extent of land, was given to defendant, and what are his liabilities under its terms with reference to plaintiff's claim in this suit.

but separate land, which he took from him, defendant, in ticca, and as plaintiff has not acted up to the terms of his lease, defendant has, under the power vested in him, ousted him. The moonsiff found in accordance with the pleas set up by defendant, petitioner, and dismissed plaintiff's claim.

"On appeal the principal assistant commissioner writes as follows :—'I am of opinion that this case cannot be decided in plaintiff's favor, for I do not find that, in the decision of the special commissioner confirming the lands as dhurmottur, it is anywhere laid down that the Bhukkuts are only entitled to cultivate a certain quantity of land each; neither do I consider it proved by the defendant's witnesses that any restriction exists on this point. The land attached to the Shustur was given for the Bhukkuts to occupy; and if, in consequence of such occupation, they refuse to fulfil the terms on which they hold possession, the remedy is not ouster, but to sue them for what may be due.'

"The defendant below has now appealed specially, urging that the judge has not decided the case on the right issues—those issues being, whether the land in dispute was plaintiff's service land or land which he had leased from the defendant; and, if the latter, whether, under the terms of the lease, defendant was entitled to oust the plaintiff.

"We think, looking to the pleadings in the case, that the objection urged by the petitioner before us is a valid one. We therefore admit the special appeal, to try whether the case should not be remanded to the principal assistant commissioner for re-trial of the issue above indicated."

JUDGMENT.

On looking to the pleadings, especially to the answer to the original suit, in which defendant distinctly avers that he holds 2½ droons by a *chegoonea* tenure, *i. e.* as we understand, with the rights of an ordinary ticca lease, we think the point taken in the above certificate clearly arises in regard to that area; and, further, on reference to the answer to the grounds of appeal, it is not quite clear from the wording of that pleading that a *ticcadaree* tenure was not then pleaded in respect to the whole land sued for.

Under these circumstances we remand the case, in order that the principal assistant commissioner may investigate whether any ticca lease, and for what extent of land, was given to defendant, and what are defendant's liabilities under it in reference to its terms, with respect to the present suit of plaintiff.

THE 23RD FEBRUARY 1859.

A. SCONCE, ESQ., Judge, and C. B. TREVOR and H. V. BAYLEY, ESQS.,
Officiating Judges.

Case No. 403 of 1858.

Special Appeal from the decision of Moulvee Mahomed Nazim Khan, Principal Sudder Ameen of Dacca, dated 15th January 1858, reversing a decree of Baboo Nurroottum Mullick, Moonsiff of Naraingunge, dated 15th April 1857.

Buktear Shikdar, (one of the Defendants,) Appellant,
versus

Shookoor Mahomed Kagzee, (Plaintiff,) and Musst. Mahajunee Beebee and others, (Defendants,) Respondents.

Baboo Unookoolchunder Mookerjee, for Appellant, Ex-parte.

The lower court having decided on the merits that, although both plaintiff's and defendant's deeds were proved, defendant's, as of prior date, should have the preference; and, further, that defendant's possession was proved, and plaintiff barred by limitation. Special appeal rejected.

THIS case was admitted to special appeal on the 29th June 1858, under the following certificate recorded by Messrs. C. B. Trevor and G. Loch.

"Plaintiff sued to obtain possession of certain lands mortgaged to him in 1251, after giving due notice of foreclosure. The defendant, who is in possession, was made a party to the suit, and he claimed the land as having purchased it from plaintiff's mortgagors in 1250 (Bhadur 31st), and pleaded that plaintiff's suit was barred by the law of limitation, he having been in undisturbed possession for somewhat more than twelve years. The moonsiff dismissed the suit, on the ground that limitation was proved; but in appeal the principal sudder ameen, without reference to the plea of limitation, tried the case on its merits, and, reversing the order of the lower court, gave a decree for the plaintiff.

"The defendant comes up in special appeal, urging that the principal sudder ameen, instead of entering into the merits, should have fixed and tried the issue of limitation pleaded by the defendant; and that, if that plea were rejected, he should have returned the case to the lower court for trial on its merits.

"No application of the law of limitation can be made in this case without an inquiry into its merits. Plaintiff claims on a mortgage of 1251, and if his vendor's title was good up to that date, he has brought his action within time. Defendant claims to have purchased from the same vendor in Bhadur 1250, and holds possession on a title adverse to the plaintiff. The vendor, though made a party to the suit, has not appeared. The principal sudder ameen, without reference to the grounds of the moonsiff's decision, has reversed the order of the lower court on the merits. We therefore admit the special appeal, to try whether the case should not have been remanded by the principal sudder ameen to the court of first instance for trial on its merits."

JUDGMENT.

On a reference to the decision of the moonsiff, we find that that officer has gone into the merits of the case, and considered that although both plaintiff's and defendant's deeds were proved, defendant's, as of prior date, should have the preference, and, further that defendant's possession was proved, and plaintiff barred by limitation.

Under these circumstances we reject the special appeal.

THE 23RD FEBRUARY 1859.

A. SCONCE, Esq., Judge, and C. B. TREVOR and H. V. BAYLEY, Esqs.,
Officiating Judges.

Case No. 495 of 1858.

Special Appeal from the decision of Mr. O. W. Malet, Judge of Beerbhoom, dated 16th January 1858, reversing a decree of Baboo Dinonath Chatterjee, Moonsiff of Dobrajpore, dated 16th December 1856.

Kylasnath Sircar, (Defendant,) *Appellant*,
versus

Dinonath Chatterjee, (Plaintiff,) *Respondent*.

Baboo Unookoolchunder Mookerjee, for Appellant.

Baboo Kishensukha Mookerjee, for Ramssoonder Chatterjee, Juggurnath Chatterjee, Hurrischunder Chatterjee, and Musst. Anundmoyee, guardian and mother of Pertabchunder Chatterjee.

THIS case was admitted to special appeal on the 4th August 1858, under the following certificate recorded by Messrs. C. B. Trevor and H. V. Bayley.

"Plaintiff sued defendant for arrears of rent for 1260 and 1261 B. S., with interest due, under a kuboolyut executed by one Urjoon Singh, from whom defendant purchased, and whose liabilities he had consequently taken upon himself. Plaintiff alleges that the rent before has all along been rs. 20-4 yearly, but by the kuboolyut was raised to rs. 24-4. Defendant acknowledges that the rent was due at the rate of rs. 20-4 for 1260, but asserts that he had paid rent for 1260 at that rate.

"The lower court discredited the kuboolyut, but gave plaintiff a decree at the rate of rs. 20-4 yearly rent.

"The judge on appeal writes as follows :—'The kuboolyut may be true, or it may be false, but, though allowed by Urjoon Singh, proof of its validity is wanting.' He then proceeds on other evidence to give a decree in plaintiff's favor for the whole amount claimed by him.

This suit being brought for arrears of rent at a specific rate as fixed by kuboolyut, failing proof that deed, the suit should be dismissed; as case is remanded for a specific finding on that point.

"Defendant, special appellant, now urges that, as the suit was brought on a kuboolyut, and the kuboolyut was not proved, this suit should have been dismissed, though plaintiff might have an action in another suit brought on a different basis for any rent due to him.

"We incline to think, though the unsatisfactory nature of the abstract of the plaint given in the judge's and lower court's decrees does not allow of certainty on the point, that the suit as brought is based upon the kuboolyut *alone*. We therefore admit the special appeal to try the point raised by special appellant."

JUDGMENT.

We are clearly of opinion, from a perusal of the plaintiff's pleadings in this case, that he brought his claim on a kuboolyut. In his reply to the defendant's answer, plaintiff expressly stated that after the farm of the village came into his hands, on inquiry it was found that Urjoon Singh held twenty-eight beegahs, and that on the 12th Kartikh 1257, he executed a kuboolyut for rs. 24-4, being an increase upon the rent formerly paid by him.

Under such circumstances, if the plaintiff were held not to have proved the execution of this kuboolyut, it appears to us that, the suit should be dismissed in conformity with the repeated rulings of this Court. But other evidence may be brought in aid of the corroboration of the kuboolyut, such, for example, as the jumma-wasil-baque papers to which the judge refers; and we accordingly remit the case to the judge, that he may consider the appeal with reference to these remarks.

THE 23RD FEBRUARY 1859.

A. SCONCE, ESQ., Judge, and C. B. TREVOR and H. V. BAYLEY, ESQS.,
Officiating Judges.

Special Appeals from the decision of Moulvee Abdool Uzeez Khan, Principal Sudder Ameen of Purneah, dated 21st December 1857, affirming a decree of Baboo Gournarain Muzoomdar, Moonsiff of Ramnuggur, dated 19th August 1856.

Case No. 362 of 1858.

Maharajah Mohessur Singh Bahadoor, (Defendant,) *Appellant*,
versus
Kunhya Jolaha, (Plaintiff,) *Respondent*.

Case No. 363 of 1858.

Maharajah Mohessur Singh Bahadoor, (Defendant,) *Appellant*,
versus
Runjun Jolaha, (Plaintiff,) *Respondent*.

Case No. 364 of 1858.

Maharajah Mohessur Singh Bahadoor, (Defendant,) *Appellant*,
versus
Sunghool Jolaha, (Plaintiff,) *Respondent*.

Case No. 365 of 1858.

Maharajah Mohessur Singh Bahadoor, (Defendant,) *Appellant*,
versus
Dookha Jolaha, (Plaintiff,) *Respondent*.

Case No. 366 of 1858.

Maharajah Mohessur Singh Bahadoor, (Defendant,) *Appellant*,
versus
Uchumbeet Jolaha, (Plaintiff,) *Respondent*.

Case No. 367 of 1858.

Maharajah Mohessur Singh Bahadoor, (Defendant,) *Appellant*,
versus
Dookha Jolaha, (Plaintiff,) *Respondent*.

Case No. 368 of 1858.

Maharajah Mohessur Singh Bahadoor, (Defendant,) *Appellant*,
versus
Jhoona Jolaha, (Plaintiff,) *Respondent*.

Baboo Unnodapersad Banerjee, for Appellant, Ex-parte.

THESE cases were admitted to special appeal on the 22nd June 1858, under the following certificate recorded by Messrs. C. B. Trevor and G. Loch.

Judgment having been given in the court below against special

appellant for damage done on account of crops forcibly carried away by his servants, it is held in special appeal that, as the plundered crop was not delivered to special appellant, and the acts of the servants were not done in the ordinary course of their employment, nor with their master's assent, nor under his direction or subsequent ratification, the special appellant was not liable to plaintiffs.

"The plaintiffs in these suits sued the servants of Maharajah Mohessur Singh, petitioner, and the maharajah himself, for the value of the crops upon 50 beegahs of land cultivated by them, which had been forcibly carried away by the servants of the maharajah. The defendant, petitioner, denied the facts alleged by the plaintiffs, and also all knowledge of them on his part. The servants, defendants, did not appear.

"The lower courts, on the ground that the acts of the maharajah's servants were for the benefit of the maharajah, inasmuch as the land upon which the crops were growing were said to belong to the maharajah, gave plaintiffs a decree.

"The maharajah, defendant, appellant below, now appeals specially, urging that, on the principle laid down by the Court on the 6th May last, in the case of Maharajah Mohun Singh *versus* Durrupnarain Koonwur, a case exactly similar to the present, the decisions of the courts cannot stand, seeing that the tortuous acts of his servants complained of have not been proved to have been committed either under the direction, or with the subsequent adoption, assent, or ratification, of himself, their master.

"We think that the decisions of the lower courts cannot stand. We, therefore, admit the special appeal, to try whether, on the ground pleaded by the special appellant, the orders of the lower courts should not be reversed."

JUDGMENT.

We think that the decision pronounced on the 6th May 1858 should govern the case now before us. No cause is set forth in the judgment of the lower courts, which can be taken to render the appellant liable for the damage done by his servants. The moonsiff infers generally that the acts of the servants were for the benefit of the master, because they happened to be in his employ. But it is not found that the plundered crops had been delivered to appellant, or in any way turned to his advantage, with his knowledge. And otherwise, as the acts of the servants were not done in the ordinary course of their employment, nor with their master's assent, nor under his direction, nor his subsequent ratification, we think the judgments given against appellant must be set aside.

Costs will be charged to plaintiffs, respondents.

THE 23RD FEBRUARY 1859.

H. T. RAIKES and J. H. PATTON, ESQS., Judges, and G. LOCH, ESQ.,
Officiating Judge.

*Special Appeals from the decisions of Mr. O. W. Malet, Judge
of Beerbhoom, dated 8th January 1858, reversing decrees
of Moulvee Gholam Buttoul Tumkin, Moonsiff of Amdurrah,
dated 6th December 1856.*

Case No. 452 of 1858.

Magaram Chatterjee, (Plaintiff,) *Appellant,*
versus

Sham Mundle, (Defendant,) and Musst. Dripomoyee Debea, (Inter-
venor,) *Respondents.*

Case No. 453 of 1858.

Magaram Chatterjee, (Plaintiff,) *Appellant,*
versus

Lochun Pyne and Huree Pyne, (Defendants,) and Musst. Dripomoyee Debea, (Intervenor,) *Respondents.*

Case No. 454 of 1858.

Magaram Chatterjee, (Plaintiff,) *Appellant,*
versus

Neetye Dass and others, (Defendants,) and Musst. Dripomoyee Debea, (Intervenor,) *Respondents.*

Case No. 455 of 1858.

Magaram Chatterjee, (Plaintiff,) *Appellant,*
versus

Nukkoor Gope, (Defendant,) and Musst. Dripomoyee Debea, (Intervenor,) *Respondents.*

Case No. 456 of 1858.

Magaram Chatterjee, (Plaintiff,) *Appellant,*
versus

Koylasnath Bose and others, (Defendants,) *Respondents.*

Baboo Baneemadhub Banerjee, for Appellant.

*Moulvee Aftaboodeen Mahomed, for Musst. Dripomoyee Debea,
one of the Respondents.*

THESE cases were admitted to special appeal on the 24th February 1858, under the following certificate recorded by Messrs. C. B. Trevor and H. V. Bayley.

" Plaintiff sues for rents of a putnee, alleging that he purchased the tenure on the 18th November 1854.

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transferred to himself by sale, it was not necessary for plaintiff to make the purchaser a
to his suits for rents; he had but to prove his own possession; no question of title was
lower court; nor could the purchaser, but r; ots only; prefer appeal against the decision.

"Defendants, the ryots, answered that plaintiff was not the real purchaser, but that Sibdyl was so, and had sold the putnee tenure to the objector, Dripomoyee.

"Dripomoyee intervened by a petition, stating she had purchased the putnee on 27th Bhadro 1262, from Sibdyl.

"In the court of first instance, and in that of appeal, Sibdyl in no way appeared.

"The moonsiff gave plaintiff a decree.

"From this decision Dripomoyee Debea appealed in No. 81, and Sham Mundle in No. 94.

"The judge received the appeal of Dripomoyee, though she had not been made a party below, nor had her alleged vendor, Sibdyl.

"The judge reversed the orders of the moonsiff, on the ground that it was necessary that Sibdyl should have been a party to the suits, but he did not decide on Dripomoyee's claim or title.

"After hearing the pleaders on both sides, and referring to the decision of the judge, we are of opinion that Dripomoyee should have been made a defendant in the court of first instance, when she put forward a claim directly adverse to plaintiff's there; and that Sibdyl should have been served with notice to appear, and plaintiff have been desired to make him a defendant.

"We admit the special appeals, to try whether the cases should not be remitted to the judge, in order that he should remand them to the court of first instance, with instructions to proceed as above indicated."

JUDGMENT.

The plaintiff in these suits sued for rent on the ground of certain kuboolyuts executed in his favor by the defendants. The defence set up was, that the plaintiff had sold the putnee to others, and the asserted purchaser intervened and alleged a sale in her favor.

The moonsiff held the plaintiff to be in possession, and to be entitled to the rent under the kuboolyuts.

From this decision an appeal was preferred to the judge by the alleged purchaser, and also in one case by one of the ryots.

The judge nonsuited the plaintiff, because he had not made the alleged purchaser a party; and on the special appeal of the plaintiff, this Court admitted the appeal, to try whether the cases should not be remanded, that the party alleging title by purchase may be made a party in the suit.

As, however, these suits are for rent on kuboolyuts, and the parties against whom they are brought plead only transfer of plaintiff's right by sale to another, the only point plaintiff has to prove is that he is still in possession; and no point of title can, it appears to us, be enquired into in this case.

We, therefore, remand the cases to the judge, who will try any one of them appealed to his court by the ryots, but will not take up the appeal of the alleged purchaser.

Ordered accordingly.

THE 23RD FEBRUARY 1859.

A. SCONCE, ESQ., Judge, and C. B. TREVOR and H. V. BAYLEY, ESQS.,
Officiating Judges.

Case No. 519 of 1858.

Special Appeal from the decision of Mr. P. Taylor, Judge of West Burdwan, dated 26th February 1858, affirming a decree of Baboo Bissessur Chuckerbuttee, Officiating Sudder Ameen of that district, dated 10th August 1855.

Putteetpabun Chuckerbuttee, (Plaintiff,) Appellant,
versus

Ramchurn Pattur and others, (Defendants,) Respondents.

Baboo Kishensukha Mookerjee, for Appellant.

Baboo Jugadanund Mookerjee, for Respondents.

THIS case was admitted to special appeal on the 10th August 1858, under the following certificate recorded by Messrs. C. B. Trevor and H. V. Bayley.

"Plaintiff, petitioner, sued Brijessuree Thakooranee and Dasseemonee Debea, putneedars of lot Kujoree, and Nundcoomar and Ramnarain, for possession of 20 beegahs of land appertaining to mouza Madhubpore, in turuf Khajooree, which had been granted to her in a mookurruree pottah by the defendants, Nundcoomar and Ramnarain, but of which she had been dispossessed by the gomashtah of Brijessuree, Dhurm Dass Mullick.

"The defendant, Brijessuree, claims the land as her punchuki bruhmoter held under the putneedar, and she acknowledges Dhurm Dass as her ryot, who may, she adds, have given a pottah to Nundcoomar and Ramnarain.

"The putneedar claims the land as his own, and ignores Ramnarain and Nundcoomar either as lakhirajdars or ryots.

"Ramnarain and Nundcoomar support plaintiff's claim, and assert that the land is their hereditary lakhiraj land.

"The sudder ameen and the judge dismissed the plaintiff's claim. The judge, in the course of his judgment, dated the 29th February 1856, observed as follows: 'It must be sufficiently clear to the conception of any one that, if it has been shown, in a manner subject to no reasonable doubt, that the land claimed by the plaintiff, appellant, as in turuf Khajooree, does not lie in that estate, but in another, his suit, inclusive of all the oral and documentary evidence,

Case remitted to the judge, with directions that he remand the case to the sudder ameen, instructing him to send an ameen into the mofussil for the purpose of making certain enquiries.

must at once be annihilated. The court is of opinion that the officiating sudder ameen, by sending for and inspecting the original char, of which copy was put in by the defendant, and on which the resumption fysallah was based, has ascertained in a manner not obnoxious to reasonable doubt, that the plaintiff has sued for the lands in dispute as in turuf Khajoorree, when they are in fact situated in turuf Rughoonathnuggur, and thus instantaneously annihilated his suit. He had a perfect right to send for the exhibit in question under the law, notwithstanding that no direct issue as to whether the lands were situated in turuf Rughoonathnuggur or lot Khajoorree had been raised, because the defendants had distinctly denied that they belonged to plaintiff's alleged maliks, and the document was, in fact, the main exhibit on which the resumption fysallah, on which the plaintiff chiefly relied, had been based.'

"In special appeal the Court, on the 20th May 1857, remanded the case, in order that the judge might decide it on the issues raised by the pleader, or if he deemed it necessary to dismiss it on the ground previously taken by him, that he will clearly show how the point is relevant to the real matter in controversy between the parties.

"The judge has again decided the case, adhering to his old judgment, and plaintiff has again come up in special appeal, urging that the judge has decided the case on an issue not legitimately before him.

"From the abstract of the pleadings above given, it would seem that the issue in this case simply is, Does this land, which both parties admit to be in turuf Khajoorree, belong to the lakhiraj land of Ramnarain and Nundcoomar, or to the punchuki lakhiraj of the defendant Brijessuree? If it belong to the former, the plaintiff's title is supported; if to the latter, his title, as laid in the case, necessarily falls. The judge, instead of keeping himself closely to this issue, has apparently wandered into matters which were not directly in issue before him.

"We, therefore, admit the special appeal, to try whether the case should not be remitted to him for re-trial on the simple issue arising in the case."

JUDGMENT.

We observe from the pleadings, that both parties claim the land in suit as being within the village of Madhubpore, turuf Khajoorree. The judge, having before him a char, upon the strength of which certain lands were formerly released to Moteeram, the father of Nundcoomar and Ramnarain Roy, the alleged lessors of the plaintiff, and perceiving that the words "turuf Rughoonathnuggur" occurred after mouza Madhubpore, considered the char conclusive evidence that the lands released were situated elsewhere, and could not be

identical with those now sued for as being in mouza Madhubpore, turuf Khajoorree ; and, consequently, that plaintiff and plaintiff's lessors' present claim must be fraudulent. We think, however, that this is laying too much stress upon the words "turuf Rughoonathnuggur." The village Madhubpore is undoubtedly mentioned in the char, and the lands now sued for are claimed as belonging to that village ; and though they are now alleged to be in turuf Khajoorree, and not in turuf Rughoonathnuggur, it is not suggested by the defendants that one portion of Madhubpore is in Rughoonathnuggur, and one in Khajoorree. On the contrary, it apparently is admitted by them, that Madhubpore is entirely in their possession, and is situated in turuf Khajoorree. Under these circumstances we remit the case to the judge, with directions that he remand the case to the sudder ameen, instructing him to send an ameen into the mofussil, for the purpose of ascertaining whether the lands formerly released to Moteeram are identical with those now in suit or not. If, from these enquiries, it should appear that they are not identical, the suit of the plaintiff, as now laid, necessarily falls ; if, however, they should turn out to be identical, the sudder ameen will then proceed to consider the other documentary and oral evidence produced by the parties in suit before him, and pass such a decision as the justice of the case may seem to require.

THE 24TH FEBRUARY 1859.

B. J. COLVIN, Esq., Judge, and D. I. MONEY, Esq., Officiating Judge.

Petition No. 1619 of 1858.

Application for Special Appeal from the decision of Mr. E. Latour, Additional Judge of Behar, dated 28th June 1858, amending that of Moulvee Syud Mahomed, Moonsiff of Jehanabad, dated 16th November 1857, in the case of

Cherungee Lall and others, *Plaintiffs,*

versus

Dursun Lall and others, *Defendants.*

Baboo Mohendro Lall Shome, for Petitioners.

Moonshee Ameer Alee, for the Opposite Party.

PETITIONERS were plaintiffs to reverse sale of certain property, *i. e.* a 10-dam share, by a Hindoo widow. She, it seems, was the widow of Jeetun Lall, who had died before his father Chintamun Lall. Chintamun, who died in 1248 F. S., had, in his life-time, separated from his brothers, whose descendants petitioners are ; and their claim is upon the ground that they had succeeded to Chintamun's estate, but had been dispossessed in 1263, and that Cheetkoour, the widow referred to, had no rights in succession to Chintamun, Remanded for fresh hearing; the enquiry of lower court having been imperfect, and the by-waste based on a misapprehension.

as her husband, who was Chintamun's son, had died before his father.

The moonsiff called for a bywusta, which ruled that the estate of Chintamun devolved upon the widow, and, accordingly, as the sale was for a debt of Chintamun Lall, amounting to rs. 168, while the property sold for rs. 500, he confirmed the sale of 3*d.*-7*c.*, reversing it for the rest, or for 6*d.*-13*c.*

Both parties appealed to the judge, who upheld the sale of 10 dams, because otherwise landed property would be valueless in the money market, and because, according to the bywusta of the pundit, the widow had a right to dispose of the property to liquidate debts of those from whom she inherited.

It is objected, *first*, that no notice has been taken of the plea that the widow lost her right in consequence of the death of her husband in his father's life-time.

Secondly, that the bywusta is founded upon a misapprehension, inasmuch as it proceeds upon the idea that the widow was the wife instead of the daughter-in-law of Chintamun, as was evident from the pundit interpreting the term buhoo as wife and not as daughter-in-law.

Thirdly, that the case should not be decided with reference to the effect upon the value of the property.

We consider that the judge's decision is short and incomplete ; and as it appears that the term buhoo,* which means both wife and daughter-in-law, has been understood by the pundit in the sense of wife, which was not the relation in which Cheetkoour stood to Chintamun, we reverse the judgment, and remand the case to the judge for a new decision, with reference to the objections as above set forth.

* See Glossary of Indian Terms.

THE 26TH FEBRUARY 1859.

H. T. RAIKES and J. H. PATTON, Esqs., Judges, and G. LOCH, Esq.,
Officiating Judge.

Case No. 101 of 1858.

Special Appeal from the decision of Mr. L. S. Jackson, Acting Judge of Rajshahye, dated 17th August 1857, reversing a decree of Baboo Punchannun Banerjee, Principal Sudder Ameen of that district, dated 6th August 1856.

Hurnath Roy Chowdree, (Defendant,) Appellant,
versus

Indurchunder Baboo and others, (Plaintiffs,) Respondents.

*Baboos Rumapersaul Roy and Shumbhoonath Pundit, for Appellant.
Baboos Kishenkishore Ghose and Dwarkanath Mitter and Mr. A. T. T. Peterson, for Respondents.*

THIS case was admitted to special appeal on the 6th February 1858, under the following certificate recorded by Messrs. B. J. Colvin and A. Sconce.

"This suit is instituted to recover money lent, on a bond dated 15th Pous 1258, to Roopmunjoree Chowdrain. In the bond it is stated that the sum borrowed (rs. 3900) was taken on the latest day of payment of Government revenue, to liquidate the arrears of revenue due by the borrower; and at the same time it is recited in the bond, that a share of the estate held by Roopmunjoree was pledged as security for the payment of the loan.

"A suit for the recovery of the debt first brought against Roopmunjoree, the borrower, was nonsuited, and the present action is laid against her adopted son, the present petitioner.

"The principal sudder ameen dismissed plaintiff's suit, but on appeal a decree has been given in favor of plaintiff by the judge.

"The ground upon which the judge's decision is based may be followed from these words in his decree. 'It seems, therefore, clear, that respondent is in possession of this estate as heir to his adoptive mother, not father; and that, in accordance with the law, as usually administered between Hindoos in this country, he is liable for the payment of her just debts.'

"For petitioner we are shown that the estate to which the judge refers and other property were taken by Roopmunjoree as a gift from Sreemuttee Chowdrain, the mother of her husband, Anundonath, and that with a view to the succession of the adopted son, whom her husband had permitted Roopmunjoree to adopt, she was enjoined not to alienate the property. It is argued, therefore, that the petitioner, the adopted son, took the estate in his own right, and that he is not answerable for the debts contracted by his mother.

The lender in good faith lent the money to save the widow's estate from sale, on security of a bond and mortgage. The present possessor, though not succeeding as her heir, is liable to the extent of the security, if the widow acted for the benefit of the estate and under necessity. Remanded to try this point.

"Perhaps the judge has not distinguished, with sufficient precision, between the personal liability of the petitioner and his liability as in possession of some property, which must be supposed to have come into his hands burdened with the debt of his adoptive mother. But the question, as raised in the suit, is of much importance; and we admit the special appeal to try whether the judgment given against petitioner should be sustained."

JUDGMENT.

The pleader for the special appellant tells us that this action is for the amount of a bond, with interest, secured by mortgage of 2 annas of an estate, consisting of 12 annas of the same estate which was bequeathed to the mother of special appellant during her life-time, with remainder to her husband's heir, who is represented by special appellant; and that the mortgage was given as security for the principal lent, the loan having been contracted, it is alleged, by the respondent, for payment of arrears of revenue, which had accrued against the estate while in the hands of the widow.

The judge finds the *factum* of the loan to be proved and the debt to be one contracted by the mother of the special appellant, and, special appellant having succeeded to the property of his mother on her death, that he is bound by the Hindoo law, as her heir, to liquidate her debts, and on this ground has decreed the amount claimed against him.

The special appellant now takes exception to this ruling of the judge, on the ground that he has succeeded to the particular estate held by his (adoptive) mother, not by right of succession to her, but as the heir of his (adoptive) father, the descent of the property being so provided for by the terms of the bequest under which his (adoptive) mother held it during her life-time; that, consequently, his succession to this estate is no evidence of his being in possession of his mother's estate, so as to make him liable for her personal debts as her administrator.

The opposite side maintain that, as the loan was to save the estate from sale for arrears of revenue, the life-holder was competent to bind the estate for liquidation of such debt, and, therefore, even admitting that special appellant is not bound, by the Hindoo law, to discharge the liability as in possession as heir to his mother, he is bound to discharge the debt to the extent of the value of the security pledged for it. The Court, therefore, it is urged, if inclined to interfere with the judgment passed, should only limit its operation to the 2 annas of the estate, that is to say, to the extent of the security given.

We entertain no doubt that there has been a miscarriage by the lower court in this matter.

The particular estate to which attention is turned by this certificate, descended to the adopted son as heir to the adopting father, not to the mother, as supposed by the judge. The mother had a life-interest only, and on her death the estate devolved on her husband's heir, and not her own. It cannot, therefore, be on the ground of any liability attaching to special appellant, as the heir to his adoptive mother, that a decree can pass against him in this action.

The ground upon which this action is maintained is, that the loan was contracted to save the estate from sale, and the *factum* of the bond and mortgage being proved, as has been held by the judge, the only question left for determination is, whether the power exercised by the mother in possession was rightly used as for the benefit of the estate, and under circumstances of real necessity. If such were made apparent to the lender, and he acted in good faith, then, on the principle so broadly laid down in the case of Hunoomanpersad Panday and Musst. Ruhooee Munraj Koonwurree, decided by the Privy Council on the 8th July 1856, and published at page 393, volume VI. part III. of *Moore's Indian Appeals*, the creditor is entitled to recover from the estate charged with the debt.

We, therefore, remand this case to the judge, who will decide the point with reference to the preceding remarks, and on the principle adverted to.

THE 28TH FEBRUARY 1859.

B. J. COLVIN, Esq., Judge, and C. B. TREVOR and G. LOCH, Esqs.,
Officiating Judges.

*Special Appeals from the decision of Mr. J. J. Ward, Judge of
Cuttack, dated 13th November 1857, affirming a decree of Roy
Gopeenath Dass, Sudder Ameen of that district, dated 29th
June 1857.*

Case No. 243 of 1858.

Golukmonee Dassee, (one of the Defendants,) *Appellant*,
versus

Kishenpersad Kanoongoe and others, (Plaintiffs,) and others,
(Defendants,) *Respondents*.

Moonshee Ameer Alee and Mr. R. T. Allan, for Appellant.

*Baboos Ramapersad Roy and Shumbhoonath Pundit, for Plaintiffs,
Respondents.*

Case No. 244 of 1858.

Nityanund Malutee, (one of the Defendants,) *Appellant*,
versus

Kishenpersad Kanoongoe and others, (Plaintiffs,) *Respondents*.

Baboo Sreenath Dass, for Appellant.

*Baboos Ramapersad Roy and Shumbhoonath Pundit, for Re-
spondents.*

Case No. 245 of 1858.

Musst. Unnopoorua Debea, (one of the Defendants,) *Appellant*,
versus

Kishenpersad Kanoongoe and others, (Plaintiffs,) and others, (Defend-
ants,) *Respondents*.

Mr. R. T. Allan, for Appellant.

*Baboos Ramapersad Roy and Kishenkishore Ghose, for (Plaintiffs,)
Respondents.*

THESE cases were admitted to special appeal on the 8th April
1858, under the following certificate recorded by Messrs. B. J.
Colvin and A. Sconce.

Held by the majority of the Court, that suits by reversionary heirs, though their interest is not vested, but only contingent, to restrain waste or alienations in the nature of waste, by a Hindoo widow, will lie.

Held, also, in accordance with the precedent of *Nundlal Baboo versus Bolakee Beebee*, that when alienations by a Hindoo widow, utterly subversive of the rights of the heirs in reversion, are proved, and it is shown that, but for the interference of the courts, ultimate loss to the heirs who may succeed eventually will ensue from the conduct of the tenant in tail in possession of the property, this Court, with a view of remedying, or rather of preventing, such loss, will step in and appoint a receiver to take charge of the estate. The reversionary heir may be the receiver, but his appointment as such is not by virtue of his reversionary right, but on a consideration of what is most for the benefit of the estate.

Held, moreover, that when a stranger is appointed as receiver, security should be demanded, but when a reversioner is appointed, his interest in the retention of the management and in the welfare of the property may stand in the place of security, the more especially as it is always in the power of the widow to move the Court, either for the appointment of a fresh receiver or for the demand of security, should the rents and profits be not regularly paid over as directed.

Special appeals dismissed, with costs.

"The petitioners in Nos. 107 and 108 were purchasers from petitioner in No. 109, who was the childless widow of a Hindoo zemindar in zillah Balasore, and who had sold to each a 4-anna share of her estate, for which reason the three petitioners were sued by the reversionary heirs to set aside the deeds, to get possession of the shares so alienated from the petitioners in Nos. 107 and 108, and to get the portion still unsold by the petitioner in No. 109 from her, on the ground that she had, by alienating a portion, proved herself unworthy of any longer retaining the management of it. The plaintiffs succeeded in their suit in both the lower courts. The judge found as a fact that the two alienations were not for the purposes pleaded, *viz.* to save the estate from sale on account of arrears arising from drought and calamities of season. He also held that the suit was not barred by previous litigation referred to, and he finally, upon the precedent of this Court, dated the 24th July 1854, (page 351 of *Sudder Decisions* of that year,) decided that all three petitioners must be ousted from the property. He, therefore, upheld the order of the first court, to the effect that plaintiffs should get possession of the property in suit, and should, after paying the Government revenue and charges of collection, pay the excess profits to petitioner in No. 109, for her benefit during her life.

"Against this decision three petitions have been filed, in which several pleas have been advanced in common, and some distinct, according to the differing portion of the parties.

"Petitioner in No. 107 says, that when he sued for possession of the share mortgaged to him on foreclosure of mortgage, Kishenpersad, one of the plaintiffs, opposed, and his objections were set aside by the courts, both of first and second instance, so that Section XVI. Regulation III. of 1793 bars the present claim. But we agree with the judge on this point, that, in a suit for possession on foreclosure, the rejection of claims of third parties does not bar their subsequently suing. This plea is accordingly rejected.

"Again, petitioners in Nos. 107 and 108 maintain the validity of their purchases on account of the necessity of the sale; but as the judge has found that there was no proof of the exigency stated, the plea is inadmissible.

"Another plea is, that the suit is barred by limitation, counting from the death of Rughoonath, the common ancestor of plaintiffs and of the husband of petitioner in No. 109. But it is plain that, as the suit might have been brought within twelve years of her death, and she is still alive, the plea has no foundation.

"Another plea, which is common to all the petitioners, is that, during the life-time of the petitioner in No. 109, this suit for possession is improper; while petitioner in No. 109 adds, on her own part, that the order for her receiving the excess profits from plaintiffs, leaving them in unconditional possession, is not sufficient security

for her obtaining what has been decreed to her. We admit the special appeals, to try whether the order of the lower court in favor of plaintiffs is correct."

JUDGMENT.

Messrs. C. B. Trevor and G. Loch.—These three special appeals have been admitted to try, *first*, whether a suit by reversionary heirs, to set aside certain deeds of sale executed by a Hindoo widow in possession, inasmuch as they were made for purposes not recognised by Hindoo law, to obtain possession of the shares so alienated, and also possession of the shares of the property still remaining unsold, on the ground that the widow, by her conduct, has shown that she is unfit to manage the same, can be brought in the life-time of the widow or not, and, *secondly*, whether, on ordering that possession be given to the reversionary heirs, with directions that they account for the profits of the estate to the widow, security should not have been taken from the heirs for the due payment of the profits to her?

There is no question at the present time that suits by reversionary heirs, though their interest is not vested, but only contingent, to restrain waste or alienations in the nature of waste, by a Hindoo widow in possession, will lie. This point has been decided frequently both in the Supreme* and this Court. The only question regarding which any contention can be raised is, whether, on waste or on alienation being proved, it is legal or proper to divest the widow of possession, placing the reversioners in possession as receivers, and liable to her for the rents and profits during her life-time?

We are unable to find any case on the point reported as having occurred in the Supreme Court, but it appears to us not improbable, looking to the principles on which that Court, as a court of equity, acts, that, on bill filed and proof given of illegal alienations, of the nature of waste, by the widow, the Court would appoint a receiver, and, if it were for the benefit of the estate, would appoint the reversioner as such receiver.

Turning, however, to the decisions of this Court, we find the case of *Nundlal Baboo versus Bolakee Beebee*,† which has, since it was passed, been the leading case on the point before us. In that case alienations were proved to an extent *entirely subversive of the rights of the heirs*, and, the deed of authorisation under which they were alleged to have been made having been declared invalid, the widow was deprived of possession of the property, which was placed in the hands of the reversioners, with directions that they should pay

* See cases of *Huridass Dutt versus Ruggomonee Dasse*, Taylor and Bell's Reports, No. 2, page 280; and *Oojulmonee Dasse versus Jogoomonee Dasse*, Taylor and Bell's Reports, No. 1, page 370.

† See Decisions of *Sudder Dewanny Adawlut* of 1854, pages 351—373.

the whole net profits arising from the several properties into the zillah court quarterly. In the event of their failing to fulfil this condition for a period exceeding three months after any payment became due, the zillah court was directed to report the circumstance, with a view to having the property placed in the hands of a surburakar or receiver.

It is now objected, that this decision is not in conformity with Hindoo law, under which, during her life-time, the widow cannot, under any circumstances, be deprived of possession of her husband's property. This objection misapprehends the ground upon which the decision objected to was passed. It was not passed as in accordance with Hindoo law, but in accordance with those principles on which a court of equity should act. Those principles regard the remedy to be applied, and do not affect the rights of parties under Hindoo law, which they leave intact.

We do not, and cannot, after the decision of the Privy Council in the case of Kassinath Bysack and Ramnath Bysack *versus* Hurrosoonderee Dassea and Kumulmonee Dassea,* decided by the Privy Council, regard the nature of a Hindoo widow's interest in exactly the same light as it was regarded by the judges who decided the suit in this Court in 1854; but, looking upon it not as a mere life estate, but as a restricted estate of inheritance, we, in accordance with that decision, think that, on sufficient proof by the reversioners being given, that, *but for the interference of the courts, ultimate loss to them as to the heirs who may succeed eventually will ensue from the conduct of the tenant in tail in possession of the property, and with a view of remedying or rather of preventing such loss*, this Court should step in and appoint a receiver to take charge of the estate. The proof, though inferential, must be clear and cogent; and unless the evidence lead inevitably to the conclusion that the heirs will be damnified if she be left in possession, the widow should not be divested of the possession of her husband's estate.

The conduct of the widow may not amount to what is technically called waste; but extending the meaning of that term to any illegal act of alienation, either directly or indirectly injuriously affecting the interests of the reversioners, alienations *contrary to the nature of her estate*, and, therefore, in the nature of waste, we think that the same course should be pursued as should also be followed in a case of technical waste.

In placing the reversioners in possession, it is to be understood that, in a case like that before us, they are in possession not by any right appertaining to them, but simply as receivers, and on a consideration that, as heirs in reversion, they have the strongest interest in the well-being of the property entrusted to their care.

* Clarke's Reports, pag 91.

For the reasons then above given, we see no room to doubt that a suit of the nature of that out of which the present special appeals have arisen, *viz.* one by a reversioner for the setting aside of illegal alienation during the life-time of the widow, coupled with a prayer for possession as receiver, is maintainable in our courts. And as the judge finds, whether rightly or wrongly, that the alienations made are so subversive of the reversioners' rights as to justify the removal of the widow from possession, in order, it would seem, to prevent future acts of the same nature, we see no ground for interfering in special appeal with the decision passed by him.

As to the second objection raised in special appeal, it is not one to which we can listen in special appeal. The power of the courts to appoint a receiver in such a case being clear, the details connected with such appointment must be left to the courts themselves. As a general rule, on the appointment of a stranger as receiver, security should be required ; but in a case in which the reversioner has been appointed the receiver, his interest in the retention of the management and in the welfare of the property *may*, in the court's judgment, stand in the place of security, the more especially as it is always in the power of the widow to move the court either for the appointment of a fresh receiver, or for the demand of security, should the rents and profits be not regularly paid over to her as directed.

Under the view of the whole subject as expressed above, we reject the three special appeals, with costs.

Mr. B. J. Colvin.—I dissent from the judgment of my colleagues ; but, as I have fully recorded my reasons for holding that such suits as the present will not lie, in the case which has been referred to, *viz.* that of Nundlal Baboo and another *versus* Bolakee Beebee and others, dated 24th July 1854, (page 351,) I need not recapitulate them here.

THE 28TH FEBRUARY 1859.

H. T. RAIKES, ESQ., Judge, and C. B. TREVOR and H. V. BAYLEY, ESQS.,
Officiating Judges.

*Regular Appeals from the decisions of Mr. G. Loch, Judge of
Purneah, dated 18th April 1856.*

Ranee Brijbuttee *alias* Ranee Bidyabuttee and others, (Plaintiffs,)
Appellants,
versus

Baboo Pertaub Singh Doukur and others, (Defendants,) *Respondents.*

*Baboo Shumbhoonath Pundit and Moonshee Ameer Alee, for
Appellants.*

*Baboo Ramapersad Roy and Bungsheebuddun Mitter, Mr. R. T.
Allan, and Moulvee Lootfur Ruhman, for Respondents.*

Case No. 661 of 1856.

Suit laid at Company's Rupees 98,810-13a-1p-4k.

Case No. 662 of 1856.

Suit laid at Company's Rupees 1113-1a-6p-4k.

Case No. 663 of 1856.

Suit laid at Company's Rupees 2211.

Case No. 664 of 1856.

Suit laid at Company's Rupees 2564-5a-4p.

THESE four appeals relate to the sale of certain estates, the pro-
perty of Rajah Bejoygovind Singh, which were sold in execution
of a decree in favor of Baboo Pertaub Singh Doukur, on the 19th
September 1851, and purchased by the Baboo, who defends the
actions.

The decision of the zillah judge of Purneah, at pages 83 to 86 of
the Zillah Decisions of April 1856, gives a full detail of the cases,
and the grounds on which he dismissed the suits and upheld the
sales of the several estates referred to.

The principal objections to the sales, and upon which the appeals
are founded, are : *first*, that the sale notices were not properly pub-
lished ; *second*, that the purchaser never paid in the money, nor filed
his receipt within the period fixed by law ; and, *third*, that, as the
parties had voluntarily entered into an arrangement, (the debtor bind-
ing himself not to alienate the property, and the decree-holder to
receive his money in another way, upon which understanding the
debtor, proprietor, had withdrawn a pending appeal, and confessed
judgment,) under the conditions then agreed upon between them,
the sale of the estates could not be enforced.

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dismissed.

With reference to the publication of the notices of sale, we allowed the case to be postponed, that the returns of the officers entrusted with their publication might be submitted for our information.

We now find that sixteen separate notices were issued, one being published at the judge's court, one at the residence of the debtor, eight in the different moonsiffes within which the estates were situated, and six in the mehals advertised for sale. The returns of the officers certify that these several notices were duly published as directed, and the names of the persons in whose presence the publications were made are noted on these returns; and the only objections offered by the pleader for our consideration are, that the returns have not been authenticated by the parties named.

This, however, is not, in our opinion, necessary to establish their authenticity. They are produced from the office to which they belong; and at no previous time have these returns been questioned, nor is it even now asserted that they have been tampered with or cooked for the occasion. It was, moreover, in the power of the appellant to summon the persons whose names are endorsed upon them as witnesses, and to have had them examined by the court below; and it is not for this Court to presume that they are other than authentic and *prima facie* evidence of the facts they relate to. We, therefore, see no reason to doubt the due and proper publication of the sale notices in the mode prescribed by law.

Something has been said by the pleader as to the insufficiency of these notices, as a means of apprising the public that the sale of these estates were about to be held at Purneah; and the pleader has argued that, as on a previous occasion, when these estates were advertised for sale, in satisfaction of this decree, notice thereof was given in some of the neighboring zillahs, and when that sale was postponed, similar notoriety of the postponement was given, so on the present occasion of sale the like publicity should have been given to it; and that the omission of such extended notice has operated to the debtor's disadvantage in the non-attendance of purchasers and the reduced price consequently bid for the estates. But this is not, in our opinion, an objection to be taken into consideration as a ground for reversing the sale. To support the validity of the sale, it is sufficient that the notices were published in those places where the law directs; and, doubtless, had the proprietor wished that notices should be sent further, any such representation would have been attended to by the judge. The legality of the sale cannot, however, be affected thereby.

On the *second* point of appeal, *viz.* the alleged failure of the purchaser to make good the amount of his bid within fifteen days, we observe that the judge below has recorded, in his judgment, that the fifteenth day fell within the long vacation, when the court was closed, and that, although the court re-opened on the 11th

November, and the purchaser's receipt in lieu of cash payment was not tendered till the 14th, yet that this is satisfactorily accounted for by the absence of the judge during the interval and his arrival at the station on the 14th of the month.

It has been argued before us by appellant's pleader, that, although the judge may have been absent from the zillah station until the 14th November, still the court must have been open from the 11th of the month for the transaction of business; and that the purchaser should, in order to close the purchase, have filed his receipt as decree-holder on the first day of the court's opening; that his not having done so must vitiate the sale, and entitles appellant to all the advantages of a resale with the publicity he would now ensure for it.

We cannot, however, allow any weight to this argument.

We observe that the decree-holder had been permitted, by order of the Sudder Court, to bid at the sale, and to tender a receipt in lieu of cash, but that other creditors, wishing to share in the purchase-money, had opposed this mode of payment. The order of the judge might therefore have been deemed necessary to warrant the acceptance of a receipt in lieu of cash payment; but, be that as it may, we consider the objection now pleaded should have been distinctly raised at the time, when it could have been either met, or the sale cancelled, if necessary. The advancement of such a plea as a ground of action, to get rid of the sale, appears to us both frivolous and vexatious, and that the alleged default has been rightly regarded as no default, by the judge below.

The only other point mooted by appellant's pleader is the *factum* of the mortgage bond, which the rajah, appellant, gave to the defendant, and which appellant's pleader assumes was a bar to any sale of the property in satisfaction of the defendant's decree.

The judge below has held, that there is nothing in the terms of the bond to prevent the decree-holder's selling the property at any time. This is also our opinion. Appellant's pleader would wish us to understand that, as the rajah had then an appeal before the Sudder Court, and withdrew it, the rajah did so only in the belief that his property would not be brought to sale in execution; but certainly the terms of the bond do not give any such assurance. The apparent object of the deed was to secure the decree-holder from any ultimate loss, in consequence of his allowing time to the rajah for the discharge of his debt from other sources than the immediate sale of his estate; and with this object the rajah mortgaged the estates mentioned. There was clearly an attempt afterwards to place the rajah's landed property under the Court of Wards, on an allegation of his insanity, and out of the immediate reach of his creditors; and it was subsequent to this that the present defendants sued out execution against the estates.

We entirely concur with the judge that the mortgage bond was no bar to the sale ; and concurring generally in the decision passed by him, we see no reason to interfere with his judgment, and dismiss these four appeals, with costs.

THE 28TH FEBRUARY 1859.

H. T. RAIKES and J. H. PATTON, Esqs., Judges, and G. LOCH, Esq.
Officiating Judge.

Case No. 504 of 1858.

*Regular Appeal from the decision of Baboo Taruknath Sein,
Principal Sudder Ameen of the 24-Pergunnahs, dated 31st
December 1857.*

Joynarain Bose, (Plaintiff,) *Appellant,*
versus

The Collector of the 24-Pergunnahs and the Superintendent of
Embankments, (Defendants,) *Respondents.*

*Baboos Kishenkishore Ghose and Shumbhoonath Pundit, for Ap-
pellant.*

Baboo Ramapersad Roy, for Respondents.

Suit laid at Company's Rupees 8351-1a.-8g.-3c.

THIS is an appeal against an order of nonsuit. The appellant was plaintiff in the cause, and sued the collector of the 24-Pergunnahs and the superintendent of embankments, to recover rent, or damages, for the land taken by Government subsequent to the decennial settlement for the purposes of poolbundee. He pleads that he purchased the estate at a revenue sale, and, in virtue of the rights thus secured to him, demands the rent from the date of his purchase.

Remanded ;
the issues adjudicated in lower court not arising from the pleadings : it should try whether, for the land occupied by Government bunds, rent or compensation from Government is not due.

The reply of the defendants is, that the construction of embankments over the country is manifestly a benefit to the zemindar, and that, under such circumstances, the zemindar is not entitled to any compensation for the land taken for the purpose ; and, further, that there must have been some agreement, either written or implied, that the zemindar was to give the land, and Government to construct and keep in repair the embankments.

The principal sudder ameen, after fixing an issue on the merits by a proceeding under Section X. Regulation XXVI. of 1814, ordered a local investigation to be made, and called upon the parties for their proofs ; but when the evidence was filed, the local enquiry completed, and the suit ready for hearing, the principal sudder ameen of his own accord fixed two new issues, on which he nonsuited the plaintiff. The issues were, *firstly*, that the plaint was indistinct, because the plaintiff had failed to mention at what date the embankment operations commenced ; and, *secondly*, that the

plaintiff should not have sued for rent at a fixed rate, but for compensation for loss sustained under the provisions of Act II. of 1855.

The plea urged in appeal is, that the issues upon which the principal sudder ameen decided were unnecessary ; that, if considered, the parties ought to have been allowed to produce proof in regard to them, whereas the principal sudder ameen, on the same day that he fixed those issues, decided the case ; and that, as the claim for rent was distinctly stated in the plaint to be for a time subsequent to the decennial settlement, the supposition of the principal sudder ameen, which he assigns as one of the reasons for his order of nonsuit, that the poolbundee system might have extended beyond the period of the decennial settlement, is gratuitous and unwarranted. As regards the second issue, the pleader observed that, when this suit was instituted, Act II. of 1855 had not been promulgated, and that it had no retrospective effect ; and, further, that though the word "*rent*" was used in the plaint, the word "*compensation*" is also made use of, and that, therefore, the objection raised by the principal sudder ameen to the plaint is invalid.

JUDGMENT.

We think that the preliminary issues raised by the principal sudder ameen did not arise on the pleadings, and that their determination was unnecessary. The plaintiff is entitled to have a decision upon the point he has submitted to the court, *viz.* whether the Government is liable to pay rent or compensation for the land occupied by the bunds raised by its own officers ? We, therefore reverse the decision of the principal sudder ameen, and remand the case for trial.

THE 28TH FEBRUARY 1859.

B. J. COLVIN and A. SCONCE, Esqs., Judges.

Petition No. 355 of 1858.

Application for Special Appeal from the decision of Mr. A. Davidson, Principal Sudder Ameen of Midnapore, dated 19th January 1858, reversing that of Baboo Poornochunder Mitter, Sudder Moonsiff of that district, dated 11th January 1855.

Damudur Micap and others, *Petitioners,*
versus

Jogeshur Patan, now represented by Lochunmonee and Alhadmonee, guardians of Gugunchund Patan, (minor,) *Opposite Party.*

Baboos Ramapersad Roy and Shumbhoonath Pundit, for Petitioners.

Baboos Jugadanund Mookerjee and Kishenkishore Ghose, for the Opposite Party.

ON the 23rd November last, under Section IV. of Act XXXIII. of 1854, the principal sudder ameen was required to certify to the Court clearly the grounds of his judgment in this matter : and the explanation now rendered appears to import so much new matter and to be so inconsistent with his substantive judgment, that we must remand the case to be considered *de novo*.

The principal sudder ameen in this case was required, under Section IV. Act XXXIII. of 1854, to certify clearly the grounds of his judgment, and the explanation rendered involving both new matter and inconsistencies with first judgment, the case is remanded.

SUMMARY CASES.

THE 16TH FEBRUARY 1859.

A. SCONCE, ESQ., Judge, and C. B. TREVOR and H. V. BAYLEY, ESQS.,
Officiating Judges.

Case No. 495 of 1858.

*Summary Special Appeal from the decision of Mr. H. C. Metcalfe,
Judge of Tipperah, dated 11th May 1858, affirming a decree
of Baboo Dwarkanath Roy, Principal Sudder Ameen of that
district, dated 20th February 1858.*

Ramkishore Burmo and others, *Petitioners,*

versus

Gooroodass Burmo, *Opposite Party.*

*Mr. R. T. Allan and Baboo Kishenkishore Ghose, for Petitioners.
Baboos Ramapersad Roy and Unookoolchunder Mookerjee, for
the Opposite Party.*

THIS case was admitted to summary special appeal on the 16th September 1858, under the following certificate recorded by Messrs. C. B. Trevor and H. V. Bayley.

"Of the two petitioners one is a judgment debtor, the other the heir of a judgment debtor. The original decree was given in favor of Gooroodass and others, jointly and severally against all defendants, on the 10th May 1842, by the judge, on appeal from the order of the principal sudder ameen. The decree gave wasilat, and ordered that an ameen should ascertain that amount. An ameen went accordingly to the spot, and reported that the amount of wasilat was rs. 5227, and that the petitioners were not in possession. This report was recited in a proceeding of the principal sudder ameen of the 2nd March 1846, and in that the principal sudder ameen ordered the sum to be realised 'from those responsible.'

"The judge ordered that the decree should be executed against the petitioners, as it was against all the defendants jointly and severally.

"The petitioners appeal specially, urging :

I. That, as the principal sudder ameen first dismissed the case, and it was the judge's decision which gave the decree-holders their decree, that decree therefore should, under the law, as it stood at the time of execution, have been executed by the judge, and that the principal sudder ameen acted without jurisdiction in executing the decree at all. Precedents, at page 198, Summary Reports, Kishenkant Acharjee's case, and page 253 of the Sudder Dewanny Adawlut Decisions of 1856, and page 327 of those of 1857, are cited in support of this objection.

II. That the decree-holders, by their acquiescence in the ameen's report, stating petitioners not to be in possession, and by their petition of the 12th Bysakh 1253, in which they prayed for execution, but

Held that the orders of the lower court are without jurisdiction, as it was not competent to the principal sudder ameen, under repeated precedents of this Court, according to the law applicable to the case, to revive execution of the decree of the judge's court, which had been referred to him for execution and had been struck off, without a renewed reference to him by the judge; that, moreover, Act XXVI. of 1852, Section I., did not apply to this case, inasmuch as a petition had been presented for the enforcement of the decree to the judge previously to the passing of that enactment. Special appeal decreed, with costs.

omitted the names of the special appellants, released petitioners from all demands under the decree.

III. That limitation bars the execution against the special appellants in two ways : *first*, as, if the principal sudder ameen had no jurisdiction, all his acts in execution are null and void, and no execution can be said to have been made for more than twelve years ; *secondly*, as the decree-holders forbore for twelve years to proceed against the petitioners personally.

" Referring to the provisions of Act XXVI. of 1852, and to the state of the law previously as taking effect *after* the proceedings of the principal sudder ameen and to the precedents cited, we admit the special appeal to try the *first* point. On the *second* point we are of opinion that there is no release by the decree-holders, and that, as the decree was against all defendants jointly and severally, the fact of the decree-holders' proceeding against others than the petitioners is no release to them. The first portion of the third objection must depend on the decision of the first point in the certificate, on which the special appeal is admitted ; and in regard to the second part of the third objection, we are of opinion that, the decree being against all the defendants jointly, so long as the decree-holders kept it alive by proceeding against any of the defendants within twelve years, the law of limitation cannot be pleaded successfully against them. We reject the application as to the second and third points."

JUDGMENT.

It appears that one Gooroodass Burmo obtained from the principal sudder ameen a decree against several defendants, including amongst them the two petitioners before the Court. This decision was affirmed by the judge of Tipperah, on appeal, on the 10th May 1842. A petition for execution was subsequently, *viz.* in 1849, presented to the judge, and the record was remitted to the principal sudder ameen for orders that execution might be taken out, the case was struck off the file by the principal sudder ameen, and apparently remained in the serishtah of the principal sudder ameen. On the 13th November 1857 the decree-holder again petitioned the principal sudder ameen to revive execution. This prayer was acceded to by the principal sudder ameen, and orders were passed by that authority in execution, and, on appeal, by the judge of Tipperah.

It is contended by the petitioners, that the act of the principal sudder ameen, consequently that of the judge also, were altogether without jurisdiction, as under the precedent of Kishenkant Acharjea,* it was not competent to the principal sudder ameen to revive execution of a decree of the judge's court, which had been referred to him for execution by the judge but had been struck off his file,

* Summary Reports, page 198.

without a renewed reference to him by the judge; that, moreover, Act XXVI. of 1852, Section I., would not apply to this case, inasmuch as a petition had been presented for the enforcement of the decree to the judge previously to the passing of that enactment.

The other side admitted that the order of the principal sudder ameen appealed against was without jurisdiction, and that, under the circumstances of the case, Section I. of Act XXVI. of 1852 did not apply.

Under this admission by special respondent nothing remains for us but to cancel the orders of the principal sudder ameen and the judge in execution, and to decree the special appeal, with costs.

It will be competent to special respondent to apply to the judge for execution in proper legal form, and it will then remain for special appellants to raise the pleas arising out of the statute of limitations, which we have deemed it unnecessary now to consider.

THE 16TH FEBRUARY 1859.

A. SCONCE, Esq., Judge, and C. B. TREVOR and H. V. BAYLEY, Esqs.,
Officiating Judges.

No. 472 of 1858.

Summary Special Appeal from the decision of Mr. W. Bell, Judge of Shahabad, dated 6th May 1858, reversing a decree of Moulvee Mahomed Oheedooddeen Khan, Principal Sudder Ameen of that district, dated 9th March 1858.

Chowdree Sheosuhye Singh and others, (Debtors,) *Petitioners,*
versus

Lalla Goureesunker and others, (Decree-holders,) *Opposite Party.*
Moulvee Murhumut Hossein and Baboo Kishensukha Mookerjee,
for Petitioners.

Baboo Chundernath Chatterjee, for the Opposite Party.

THIS case was admitted to summary special appeal on the 8th September 1858, under the following certificate recorded by Messrs. C. B. Trevor and H. V. Bayley.

"Special appellant was the defendant in a case in which Lalla Goureesunker was the plaintiff. A decree was given against him for the land sued for, with wasilat from 1255 to 1261, and interest upon the wasilat from the date on which the wasilat was rightly due. In execution, the principal sudder ameen has determined that that date was from the date of the ascertainment of the wasilat in execution. The judge, on appeal, has determined that it was from the commencement of the year following that for which the wasilat was due.

In the decree under execution, interest upon wasilat was ordered to be paid from a *fit date.*

Held that as this expression is indefinite, interest should run from the date of ascertainment of principal.

"The debtors now appeal specially, urging that, according to the terms used in the decree, the judge's order in execution is incorrect, and that of the principal sudder ameen correct.

"We think that considerable doubt exists as to the mode in which the original decree should be construed. We, therefore, admit the special appeal, to try whether the interpretation put upon it by the judge, or that by the principal sudder ameen, is correct; or whether the indefinite terms of the decree should not be interpreted, in accordance with the practice of the Court in the matter of interest on mesne profits, to mean from the date of the institution of the suit."

JUDGMENT.

Having had a copy of the original decree made in this case before us, the order we find may be given as follows. It directs possession of the disputed land to be given and wasilat thereon from the date of suit in 1254 to the date of possession, according as the amount should be ascertained on a mofussil enquiry, with a deduction of 10 per cent. for charges of collection, and the allowance of interest upon the principal from a fit (wujoo) date. The word *fit* here employed is indistinct, and as in that sense the decree does not definitely declare, as contemplated in the summary order of 1st October 1850, from what date the interest on wasilat should be in this case awarded, we would follow the ruling in the particular case then before the Court, and allow interest, as done by the principal sudder ameen, from the date of the ascertainment of the principal.

We, therefore, set aside the judge's order, and affirm that of the principal sudder ameen, with the costs of this and the judge's court on special respondents, the decree-holders.

THE 21ST FEBRUARY 1859.

C. B. TREVOR and H. V. BAYLEY, Esqs., Officiating Judges.

Petition No. 653 of 1858.

Application for a Summary Special Appeal from the decision of Mr. F. B. Kemp, Judge of Backergunge, dated 11th June 1858, affirming that of Sreenath Bidyabagish. Principal Sudder Ameen of that district, dated 20th March 1858, in the case of

Komulchunder Saha, Decree-holder,
versus

Brijesshuree, Debtor, and Bhugwanchunder Chuckerbuttee, Claimant.

Baboo Unookoolchunder Mookerjee, for Petitioner.

Baboo Ramapersad Roy and Dwarkanath Mitter, for Bhugwanchunder Chuckerbuttee, Claimant.

It is hereby certified, that the said application is granted on the following grounds. Petitioner is the purchaser of a decree obtained by one Gunganarain Chowdree against one Brijesshuree. On the 24th December 1855, in a suit instituted by the above Gunganarain Chowdree, to set aside the summary orders of the principal sudder ameen of Backergunge and of this Court, directing the sale of certain property as belonging to Brijesshuree, a judgment debtor, on the ground that the property had been sold to him by that person, this Court dismissed the plaintiff's claim, holding the property to belong to Brijesshuree.

On the 21st Pous 1262, the present petitioner applied for attachment of the same property, consisting of certain golahs; and on the 22nd Pous a petition was presented by one Bhugwanchunder Chuckerbuttee, claiming the property as having on that date been sold to him by Deenonath, the son of Brijesshuree. Nothing more appears at the time to have been done by the petitioner in execution. On the 15th July 1857, Bhugwanchunder Chuckerbuttee instituted a regular suit, to try the validity of his purchase; and on petitioner's again moving the principal sudder ameen for execution, that officer refused to enquire summarily into the *bona fides* of the sale, as a regular suit had been instituted for that purpose; and on appeal the judge affirmed the principal sudder ameen's order.

The petitioner has now appeared before the Court in special summary appeal, urging that the fact of the objector Bhugwanchunder's

on petitioner again moving the court in execution, the lower courts have refused to enquire summarily into the *bona fides* of the sale, as a regular suit has been instituted for that purpose.

Held on special appeal that, notwithstanding the institution of a regular suit by the claimant from Deenonath, petitioner is clearly entitled to a summary enquiry on the same point in execution.

Case remitted to the lower court for enquiry, first, whether the decree purchased by petitioner was a personal one against Brijesshuree, or whether it was for a debt incurred on behalf of her husband, and, secondly, if the latter, whether the transfer to the claimant, Bhugwanchunder Chuckerbuttee, be *bona fide* or not.

having filed a regular suit, is no valid cause for refusing to have in execution a summary enquiry on the same point, especially as he is not a party in the case instituted by this individual.

We think that, notwithstanding that a regular suit has been instituted by Bhugwanchunder Chuckerbuttee to try the *bona fides* of his purchase, petitioner is clearly entitled to a summary enquiry on the same point in execution. We, therefore, remit the case to the judge, and he will remand it to the court of first instance, with directions that an enquiry be made, whether the decree purchased by petitioner was a personal one against Brijesshuree, or whether it was for a debt incurred on behalf of her husband ; if it be the former, nothing more need be done, as the property, which in reality belongs to her son Deenonath, will not be liable for her debts ; if the latter, the court will then enquire whether the transfer to the objector, Bhugwanchunder Chuckerbuttee, be *bona fide* or not, and pass such an order as the justice of the case may seem to require.

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Ramkishore Acharj Chowdree v. Bhoobunmoyee Debea Chowdrain and others.

Suit by A, as adopted by B, under a power of adoption granted by her deceased husband C, to succeed to his estate on death of D, the natural born son of C.

Held, that the best evidence of which a case is susceptible should be offered, and secondary evidence, which is merely substitutionary in its nature, should not be received so long as original evidence is attainable. Moreover, a party in whose power a deed has been, should give satisfactory evidence of its loss or destruction before secondary evidence can be properly admitted. If, however, it be shown, as in the present case, that the production of primary evidence is out of the party's power, secondary evidence is admissible.

Held, that the doctrine of implied revocation can only be legitimately inferred regarding a lost or missing instrument, which has always remained in the power of the party making it; that, consequently, both from the delivery of the deed from C to his wife B, and also from the object of the deed, revocation by C in the present case is not to be inferred.

Held, that the absence of the original deed, or its suppression by B, or her temporary action in opposition to it, cannot extinguish the power created by her husband C.

Held, that the evidence of witnesses, not named in the deed, is not necessarily inadmissible; and that, with reference to the lapse of thirty-five years from the date of the deed, to the presumption of the death of the witnesses to the deed, as asserted by plaintiff and not rebutted by defendant, to the formal registration of the deed, two years before C's death, in repetition of a similar power previously registered, and to the legal efficacy of a verbal power, the grant of the power by C is proved.

Held, that the delivery of A by his natural father, jointly with his wife, in his life-time, to B as her adopted son, is proved; and that the question of impurity said to attach to the giving of A by his natural mother, on the day following her husband's death, cannot, in this case, properly be raised.

Admitting plaintiff to have been of the age of twelve years at the time he was given in adoption, held, that he, being a brahmin, and the nephew of his adopting father, the initiatory ceremony of investiture not having been previously performed, his adoption was valid.

Held, that by the death of D, the natural born son of C, without issue, A is legally, under the deed of permission, entitled to take his estate as against E, the widow of D.

Held, that the deed of permission said to have been executed by D in favor of E, and the adoption of defendant by E, under the power alleged to have been granted by her husband D, are not proved ... 229

Mrs. Charlotte Dacosta and others v. Mirza Mahomed Alee and others.

Where a plaintiff sued to recover rent, and the defendant pleaded possession of the premises as proprietor, it was held that the rights of the respective parties must, under the circumstances, be determined before the claim for rent could be inquired into ... 261

Srinath Hazra v. Ramdhun Hazra.

Held, that where the defendant putneedar admitted that he had contravened the law by bidding in the name of the plaintiff, at a sale under Regulation VIII. 1819, for his own putnee, which was put up for arrears of rent, he could not oppose possession being given to the plaintiff, in whom the legal title was vested, nor call upon him to prove that he was a bond fide and not a benamese purchaser ... 267

Gooman Raot and others v. Bydnath Jha and Sheosuhye Singh.

Remanded according to a former precedent ... 269

Sheikh Bukhtour, after him his son Sheikh Shubratee, v. Syud Turrahum Hosein and others.

Where the mortgagee had filed accounts for seventeen years and endeavored to account for the absence of certain intermediate accounts, it was held that the judge, instead of dismissing the suit, because these accounts were not filed, should have accepted those that had been brought forward if found worthy of credit; and if the mortgagee were unable to account satisfactorily for the missing accounts, he should have accepted the defendants' estimate of profits for three years, and have thus determined whether the loan and interest had been liquidated from the usufruct ... 270

Raujdoolub Ghose, representative of Ramkissen Ghose, v. Omrao Singh and others.

Plaintiff sued for possession of certain land, of which contrary to an engagement entered into with them, he had been dispossessed by defendants, and for damages and interest on the same.

Defendants pleaded that the plaintiff had resigned the property voluntarily, and consequently they are not liable to him for any damages in the matter of short collections made previous to his resignation.

The lower court gave plaintiff a decree for possession only. On appeal, the judge gave plaintiff a decree as sought for by him.

Held, in special appeal, that the real issue in this case is, whether plaintiff voluntarily resigned the lease or was dispossessed of it. If the former, he will have no action against the defendants; if the latter, they will be justly liable for damages. This issue not having been tried below, the case is remitted to the first court for re-investigation ... 272

Ramloll Chowdree v. Bhoyrub Dutt Jha and others.

Held, that the ruling in the summary case, 11th March 1844, collector of Mymensingh, petitioner, was that where property was partly that of Government and partly of individuals, its partition should be made

under Regulation XIX. of 1814, and that in this case where the party partitioned his property with a co-sharer, by a private arrangement, that precedent had been misapplied ... 273

Ramkissen Patjoshee Mahapatur v. Hurrykissen Mahapatur.

Held, that a release pleaded by a guardian as given by his minor ward requires clear and strong proof of its execution, and that, in a case of such relation between the parties, a release of this nature would not, even if proved, be necessarily conclusive.

Held, that defendant, having, as guardian for plaintiff, a minor, received certain bonds as part of plaintiff's share of his ancestral property, was bound to account to plaintiff for them, even if the bonds were on account of the separate transactions of the parties and irrespective of their rights as ancestral co-sharers.

Held that, where it was not shown that repayment of a mortgage of part of property was made from other than the joint funds, or that the property was other than joint ancestral, plaintiff was entitled to his share.

Held, that a julkur not being shown to be other than part of ancestral property, a farming settlement with a stranger on resumption does not destroy the proprietary title of plaintiff according to his share.

Held that, where defendant did not prove his plea that after receipt by him as guardian of ornaments and clothes, the share of the plaintiff, he, defendant, made them over to plaintiff, plaintiff is entitled to a decree for them ... 274

Madhubchunder Roy v. Shamanund Gossain and Achootanund Gossain.

Suit to set aside certain leases set up by defendant, appellant, as having been executed by plaintiffs. The zillah judge has held the leases not to be genuine, and in appeal that judgment is upon the evidence affirmed ... 278

Gunnesh Dass Aghurwall, Mooktear and Gomashta of Hurdialjee Ramseek Doss, Insurance Company, v. Pertab Singh Dooghur.

Appeal dismissed, since the real defendant had not put in legal security in the lower court, and, from the judgment there passed, could not be entitled to appeal through agent ... 282

Baboo Doorga Dutt v. Baboo Gunnesh Dutt and others.

The mortgagor failing to prove local custom of redeeming mortgage by paying the principal debt, and interest from the date of notice of foreclosure only, and such custom being not the law, his claim to a title to redemption could not be sustained ... 284

Aga Mahomed Kumul Tehranee v. Aga Abbas Tehranee.

When a party sought to recover possession of wuqf property, and to be allowed to exercise the office of mootuwallee jointly with the defendant, held, that as the plaintiff had been proved by a judicial decision of a civil court to have misappropriated part of the wuqf property, he could not look to the court to assist him, as he did not come into court with clean hands ... 285

Mahomed Hafiz and others v. Moulvee Abdool Alea and others.

As plaintiff, even if he had not authorised purchase in the name of another of the estate sold for arrears of revenue under the old sale law, had made use of the transaction as if he had, he was disqualified (under precedents) from maintaining an action for possession, &c. ... 287

Brindabunchunder Mozoomdar v. Roopmunjooree Chowdrain, mother and guardian of Nobocomar Sirkar, (minor,) and Juggutchunder Sirkar.

Claim to a refund of part of rent paid as founded upon stipulations between the landlord and tenant, dismissed, there being no evidence ... 291

Gopal Sing v. Bheekunlal and others.

Held, that plaintiff, suing for 10½ annas of a property and averring possession of 6½, can only sue for 4 annas.

Held, that when parties agreed to a decision according to the Mithila law, the specific authorities of that law, and not those of the Mitakshara, should be cited to support a bywastha.

Held, that as the Hindoo law only contemplates the illegality of a father's alienation without a son's consent, in certain cases, a suit by a nephew against his uncle's alienation was wrong; and further was not referred to in the bywastha relied on.

Held, that the judge's dictum, that a deed must always speak for itself, was incorrect, and that in many cases its terms are to be interpreted by the surrounding circumstances of the case ... 294

Jeenarain Bose and others v. Rao Moheshnarain Rai and others.

In a suit for possession of alluvion, in which boundaries were disputed, part of the ground was by local enquiry identified with former revenue measurements, and variously proved to have been all along in defendant's possession. To it the statute of limitations applied; and to accretions upon it, therefore, plaintiffs could have no claim ... 297

Soondernarain Mytee and others v. Chowdree Ukhoyarain Dass Mohapattur and others.

Case remanded for decision upon the pleas raised, not on a question of fraud, not put forward as invalidating the sale ... 301

Elaheebuksh Chowdree v. Mahomed Kaem and others and Shumboo Bewah and others.

When a summons for the attendance of the petitioner, defendant in the suit, was issued under the provisions of Section XXIV. Act XIX. of 1853, and he concealed himself, so that the summons could not be personally served, and afterwards filed a petition in the lower court, stating that he was aware of the issue of the summons, but could not, without disgracing himself, appear to give evidence in so trifling a matter; held that, under the circumstances, the moonsiff acted properly in disposing of the suit ex-parte ... 302

Musst. Khedun Kooar, mother and guardian of the minor sons of the deceased plaintiff, Busdeonarain Singh v. Muhabil Singh and others.

Suit brought to set aside two zur-i-peshgee leases in so far as they covered plaintiff's share of certain property, the ground of action being the incompetency of the lessor, plaintiff's elder brother, to make the leases during plaintiff's minority.

Held, that as more than twelve years had elapsed from the date of plaintiff's majority before the suit was brought, and plaintiff in the plaint admitted his knowledge of the leases and of his brother's acts from the time of his majority, the action is barred by lapse of time ... 304

Yusuf Alee Khan v. Teepoo Khan.

Yusuf Alee Khan v. Teepoo Khan.

The presumption from the admitted execution of the deed, and from plaintiff's possession for two years under it, being that the recital in the deed

of the passing of consideration was correct, till the contrary should be shown; held, that the burden of proof of no consideration was on defendant.

Held, on the evidence and probabilities, that the consideration did pass.
Appeal dismissed ... 306

Bhugwanchunder Goochoo v. Ramsebuk Somurdar.

In a summary suit for rent, where the name of the defaulting ryot was incorrectly given, but the notices prescribed by law were duly served; it was held that, in the absence of any fraud, the misnomer was insufficient to vitiate the proceedings before the collector ... 308

Maharajah Ishanchunder Manik v. Nujeebunnissa.

Case remanded, the question at issue not being one of resumption, and the judge having misapplied the precedents cited. The case was to be tried as one of ordinary boundary dispute ... 309

Baboo Bhugwan Lal Sahoo v. Rajah Sahib Perlal Sein.

Held, that although the principal sudder ameen had at first summoned the plaintiff, special appellant, to give evidence, still as he had subsequently declared, whether rightly or wrongly, that his attendance was unnecessary, and has given a decree in his favor, it was not competent to the judge, simply on the ground that his attendance should have been required, to have in effect dismissed his suit, but it is competent to the judge, if he thinks it necessary, to cause the processes to be issued for the attendance of the plaintiff to give evidence before him, and, if the plaintiff fails to attend after those processes have been issued and served in due legal form, he will be liable to have his suit heard ex-parte under Section XXIV. of the Act.

Case remitted with directions to the judge to act as suggested by the Court. 310

Haradhun Chatterjee and others v. Bukronath Mookerjee and others.

Ramdoollub Chatterjee v. Soorjeenarain Chatterjee and others.

Bukronath Mookerjee and others v. Haradhun Chatterjee and others.

Where suit was laid to cancel a deed of sale as a deed never executed, but it was proved that it existed in 1889, and was known to plaintiffs' predecessors as an adverse title against them held by the purchaser and urged by him then in a court of law, the lower court rightly applied the statute of limitations to their claim. Appeal dismissed; petitioners also were held liable for defendants' costs ... 313

Koonjbharee Lal and others v. Rajah Neelanund Singh and others.

As the oral evidence produced by the parties showed that the water-course, the subject of this suit, had been excavated and kept in repair by the former zemindars of Muhalat Khurrukpoore, and the defendants were unable to prove any right to, or previous use of, the water for irrigating their lands, the decision of the lower court, directing that certain channels cut by the defendants be closed, was confirmed.

Held, that a party who had purchased the property after the act of trespass from the wrong-doers and was in possession when the suit was brought, though rightly made a party to the suit, could not be made liable for the plaintiff's costs, merely because he opposed the plaintiff's claim, and that, as he was dragged into suit by the wrong-doing of his predecessor and co-defendants, his costs should be charged to them ... 317

Phurrut Sing v. Meer Saadut Aleo.

Remanded to the zillah judge that he may try whether special appellant, a defendant who had not appeared in the first court, shows good cause for the failure in his appearance ... 320

Rajah Sâhib Perlal Sein v. Debee Dutt Misser.

As the execution of the promissory note was proved, and the rajah refused to appear in court, and could not therefore file proofs in support of his denial, plaintiff's claim and decree were upheld ... 321

Doollubb Bhutt v. Hurrokishen Myteq and others.

Doollubb Bhutt v. Kuroonakar Shusmal and others.

Plaintiff lent to the defendants a certain quantity of grain, defendants covenanting that plaintiff should retain possession of certain lands belonging to them and repay himself from the crops. Plaintiff obtained possession and was subsequently dispossessed by defendants. He then sued for the equivalent of the grain in money. The court nonsuited him. He now sues for possession, in order that he may re-pay himself from the produce of the lands, according to the terms of the contract. The lower court gave plaintiff a decree. The judge, on the appeal of two defendants, non-suited the plaintiff, as plaintiff was not at liberty to disregard the procedure laid down by Regulation XVII. of 1806 with reference to mortgages.

Held, on special appeal, that the judge's order was incorrect; that the transaction was in the nature of a usufructuary mortgage; and the law of 1806, applicable to conditional sales, was entirely beside the question.

Cases remitted for re-investigation on the merits ... 322

Kirtinarain Deb v. Mudhoosoodun Chuckerbuttee and Musat. Hurromonee Debea and others.

Suit brought by purchaser at an execution sale to recover his purchase money (still in deposit,) on the ground of the sale being set aside on proof of the debtor's having no title to the property sold. Judgment having been given for plaintiff, the decree-holder in the execution case urges in special appeal that, with reference to the decision given at page 1091 of Decisions of 1857, the suit will not lie.

Held that, as special appellant in his answer denied his liability for the sale, which he ascribed to the collusion of his pleader, he substantially gave up all claim to benefit by the purchase money ... 324

Bissakha Debea v. Hurrochunder Surma and Sudanund Surma and others.

Case remitted, in order that the principal sudder ameen may remand the case to the moonsiff, who will give the plaintiff an opportunity of filing the petition alleged to have been executed by the defendant, acknowledging the sale of the property in suit by her husband Sudanund to the plaintiff, and who will, after testing its genuineness, if it be questioned, and scrutinizing its terms, pass whatever order may eventually seem just and proper ... 326

Must. Mohun Malla v. Mr. Robert Hollow and others.

Suit to set aside sale of an under-tenure made in execution of a summary decree, which, in a regular suit subsequently instituted, had been annulled; also to quash a second summary suit and second sale.

Held, that though this suit was not instituted till more than one year had elapsed from date of second summary decree, plaintiff's action was not

- barred, as plaintiff was not personally liable as a defaulter in the second summary suit, and as plaintiff had specially pleaded and the principal sudder ameen found that the zemindar himself held the under-tenure in the name of his naib, and brought a collusive suit against the nominal tenant.*
Held also that, with respect to the second sale in execution, a suit to set it aside is not restricted to one year from the date of the sale ... 328
- Roodrakant Surma Chowdree and others v. Kasheenath Surma Chowdree.**
- Suit, brought to give effect to a deed of compromise said to have been executed after an earlier suit between the same parties was decided, was dismissed by the first court as being in a matter already adjudicated; but the case was remanded by the lower appellate court on the ground that the plaintiff had set forth in this suit a new cause of action. Order of remand affirmed in special appeal* ... 331
- Mr. Henry Mackenzie v. Chunder Seekhur Roy.**
- Remanded, for trial whether the credits to current rent and bukaya were proper or not* ... 333
- Synd Keramat Alee v. Rajah Barodakant Roy and others.**
- Decision of the lower court confirmed, as the evidence produced by the plaintiff was considered insufficient to prove his right to, and previous possession of, the tract of reclaimed jungle land in dispute,* ... 334
- Messrs. Gordon, Stuart, and Company, Secretaries of the Bengal Coal Company v. Neerunjun Achary and others.**
- Remanded: the order of non-suit was not justified when plaintiff sufficiently indicated the extent and boundaries of the lands* ... 338
- Ramram Ghose v. Joykishen Mookerjee.**
- In a suit to resume certain lands, the plea of limitation was raised, and, on trial, was rejected by the judge, on the ground that the grant of the defendant was not valid; but the case is remanded to try simply the existence of the tenure before the 1st December 1790, as the validity of the grant and competency of the grantor are not points relevant to the question of limitation* ... 340
- Joyhurree Hazaree v. Mr. H. Harold.**
- Case remanded, in order that it might be tried, firstly, as to how far the contract for the execution of a certain work had been fulfilled, and thus to what extent the other party was entitled to get the rest done by other hands at the charge of the contractor, and whether such charge was reasonable; and, next, as to what balance, if any, was due to the contractor, after such deduction and the fine provided for in the agreement...* 341
- Reazooddeen v. Moolayee Khan.**
- Case remitted to the judge in order that he may remand it to the principal sudder ameen for re-investigation on the real issues raised in the pleadings, which are:—*
 1st. *Whether the howaladar's tenure of defendant covers Grisbhooshun's share of the oust talook alone, or both the shares of Grisbhooshun and Shusheebhooshun.*

2nd. If the former, then is plaintiff's present claim conformable with law?

3rd. If the latter, then, looking to the terms of the *howaladarree pottah*, both as to measurement and subsequent assessment, is the claim sustainable or not?

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Rajkissen Rae v. Dewan Munooowur Ally and others.

Held, that, if a court, by virtue of the authority conveyed in Section XXXV. Act XIX. of 1853, direct a party to be summoned as a witness, the process of service and obligation incident to the service of the summons follow the rules laid down in Section XXIV. But, in this case, the order of the principal sudder ameen is set aside, as the expenses requisite for attendance of witness were not supplied

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Heetlal Misser v. Benudram Sein and others.

Takoorlal Gossain v. Benudram Sein and others.

Shamlal Gossain v. Benudram Sein and others.

Rookeenee Koomaree Debea v. Benudram Sein and others.

Benudram Sein and others v. Heetlal Misser and others.

In a suit by a purchaser at execution sale against the decree-holder, for possession of a share of estate, in which he had bought the rights and interests of the judgment debtor, less certain alienations made prior to notice of sale by deeds, which were not shown to be other than genuine, plaintiff was unable to show what his purchase comprised: to no decree, therefore, for the same, could effect be given. Order of lower court reversed

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Ranee Sheosoonderee Debea v. Mr. D. Rimon and others.

Ranee Sheosoonderee Debea v. Rane Soorujmonee Debea and others.

Two suits have been instituted, one by A for possession of certain lands decreed to B under Act IV. of 1840, another by B for reversal of a survey proceeding drawn up subsequently to the decision under Act IV. of 1840, including the lands within A's estate.

The principal sudder ameen, looking upon B's case first, determined that he had not proved that the land entered in the thakbust as belonging to A was within his estate. He, therefore, dismissed B's case, and, as a necessary consequence, decreed that instituted by A.

Held, on appeal, that as B was in possession under the order of the criminal courts acting under Act IV. of 1840, in other words, under the order of a court of competent jurisdiction, and as the order of the survey authorities was subsequent in point of date to that of the magistrate and session judge, his possession should have been upheld until A showed a title superior to his; that, consequently, A's case should have been taken up first, and B's have followed the result of it; and the principal sudder ameen in acting otherwise has erred in his mode of disposal of the cases before him.

Held, also, that the evidence produced by A is totally insufficient to warrant the court's entering into any enquiry of B's title.

The decision of the lower court in A's suit is reversed, and in B's suit, also, that decision is reversed, and B is declared entitled to have the lands in dispute demarcated as belonging to turuf Telkops. The costs of both courts to be borne by A.

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Musst. Fatima Begum v. Mirza Mahomed Jaffer Khan and others.

Plaintiff sued certain defendants to set aside a deed of gift, alleged to have been executed by her, pleading that it was a forgery, and executed by other

parties without her knowledge and consent, though probably for her benefit.

Defendant Mirza Mahomed Jaffer Khan answers that the deed of gift is a bonâ fide document, given for good consideration. The other defendants do not appear.

The lower court dismissed plaintiff's claim, being of opinion that the deed of gift was concocted by the non-appearing defendants, but with the knowledge and consent of plaintiff, with a view of defrauding third parties.

Held, on appeal by Mahomed Jaffer Khan, that on the pleadings in this case the simple issue between the parties before the court is whether the deed of gift is an authentic document or not, and whether the consideration pleaded by defendant passed to plaintiff or not; and that it was not competent to the principal sudder ameen to stigmatise the plaintiff's conduct as fraudulent when such a plea is not entered upon by defendants.

Held also, that as the defendant appealing is unable to prove the special plea of consideration raised by him, plaintiff is entitled to that which, but for the deed set up by the defendant, which has been declared fraudulent against two defendants who have not appealed, confessedly belonged to her.

Decision of the lower court reversed as regards the plaintiff, and the property sued for decreed to her with wasilat from Assin 1266 to the date on which she may obtain possession, and with costs ... 358

Rychund Bunik v. Greeshchunder Goho and others.

A special appeal was admitted to try whether parole evidence could be admitted to alter the express words of a deed.

Held, that parole testimony, though admitted to explain, cannot be received to vary, contradict, or subtract from the terms of a valid written instrument ... 362

Hurrischunder Banerjee and others v. Gyaram Mundul and Neelruttan Banerjee and others.

Arrears of rent for 1260, 1262, and 1263 having been adjudged by the lower appellate court, that decision is modified with respect to the two last years, as the principal sudder ameen has misapprehended the effect of a previous decision passed in a suit brought for the rents of 1262, which determined that special appellants were not in possession of the land, and not liable for the rent claimed ... 363

Mewalal v. Premdeonarain, son and heir of Ununtolal, deceased, and others.

Held, that in order to bring a proceeding within the category of an award, there must be a judicial enquiry, either more or less formal; that in the present instance the survey officer refused to enter into any enquiry at all, and the mere record of this refusal is no award, and, consequently plaintiff, special appellant, is well within time in bringing his present suit under the general law of limitation. Case remitted to the lower court for investigation on the merits ... 365

Mr. W. Foley v. Mrs. E. Kalonas and others.

In a case where effect had been given to a private award of arbitration as if it had been one under Regulation XVI. of 1793, it was pleaded that a payment made intermediately was consequently null and void, and could not give a new cause of action.

Held that the payment having been admitted, by not being denied in the answer, and so being an acknowledgment of the sum declared due by the arbitration award, must be taken to give a new cause of action ... 367

The Government v. Shumsheir Alee, well-wisher of Musst. Noorjan Beebee, daughter of Mahomed Ruffee, deceased.

In this case, the sale of an estate made for arrears of revenue has been set aside by the lower appellate court on the ground that, as the revenue of the estate was less than rs. 10, and all such estates were, under the rules of the Board of Revenue, to be sold only on the 25th May, this sale, held on the 25th February 1845, was illegal.

But, on special appeal, the decree of the principal sudder ameen is reversed, inasmuch as the rules referred to by that officer were promulgated to have effect under Act I. of 1845, which did not come into operation till the last day of February 1845, while the sale in question occurred on the 25th February, under the provisions of Act XII. of 1841 ... 370

Rajah Nursingh Deb v. Ryemonee Debea and others.

Held, that when the statute of limitations, either ordinary or special, in bar of hearing a suit, was not distinctly brought forward by the defendant in his answer, he must be considered to have waived the plea and consented to have the case tried on its merits, and that under such circumstances a plea of limitation could not be heard by the appellate court.

Held, also, that a respondent in special appeal, though he do not appear at the trial may apply for a review of judgment on the same ground as a defendant, against whom an ex-parte decision has been given, is allowed to appeal on the record ... 372

Sheosuhaye Singh and others v. Gobind Roy and others.

By the Mitakshara law, alienation without consent of heirs being unlawful but under necessity, a transfer by mortgage, made to clear off old debts and pay for a marriage, was held to have been made under sufficient urgent cause ... 376

Ramchund Roy and others v. Mr. Dubois D'Saran, manager and proprietor of Kotoreah concern, and others.

Appeal dismissed. Where A held half share in a putnee lease, and defendants had taken possession of a portion of the estate comprised in it, on the ground that A and his brothers had executed a durputnee of A's share in their (the defendants') favor, the lower court found the deed to be not genuine, and kept A in hhas possession ... 378

Soorjokoomar Sadoo Khan v. Soorujmonee Dassee, mother and guardian of Taruknath Ghose, minor.

The surety, having assumed the judgment debtor's responsibilities, all the property held by him up to his decease was answerable, and could not be withheld by his heirs ... 381

Lalchund Shaha v. Ummut-ul-khyr Beebee and Jamanut Khan.

Under former precedents, the lower court was not competent to interfere summarily in a suit for possession of land held by a mortgagee under simple usufructuary mortgage ... 382

Baboo Doorgapersad Singh, for self, and as guardian of Dhurmnarain Singh and Purnoo Singh, heirs of the late Lokenath Kooer v. Jogeshur Dass.

Held, that under Section XX. of the C. O., dated 17th July 1846, a civil court, making a sale in execution of a decree, is authorised to interfere summarily and give possession of the property to the auction purchaser

when opposed by the judgment debtor, or a claimant whose claim has been disallowed previous to sale ... 384

Luchmeenarain v. Lalla Pookhun Lal.

A decree-holder in 1845 took out execution against his debtor; certain monies in deposit were attached, and the decree-holder was directed to file a receipt for the amount and to take away the money, and the decree was declared in July 1845 satisfied to the above amount. No receipt, however, was filed, and the sum in deposit went to pay other debts of the debtor.

Held, on special appeal, that the decree-holder was at liberty to take out execution of the whole decree obtained by him against the debtor, and that the order of the judge, dated July 1845, declaring the decree satisfied to a certain amount, was conditional on the receipt of the money by the decree-holder and on his filing a receipt; and, as he did neither, no satisfaction of judgment resulted.

Case remitted to the judge, with directions that he will remand it to the principal sudder ameen, who will pass the necessary orders in execution in conformity with the above remarks ... 386

Laljee Sahoo v. Bolakee Lal and others.

Section XXXIX. Act XIX. of 1853 applies to parties in a suit. Where a witness has, on a first summons, attended and been discharged, the party re-summoning him should prove a sufficient cause before re-attendance is enforced ... 388

THE 1ST MARCH 1859.

A. SCONCE, Esq., Judge, and D. I. MONEY, Esq., Officiating Judge.
Petition No. 1313 of 1858.

Application for Special Appeal from the decision of Mr. T. Sandys, Judge of Bhargulpore, dated 19th May 1858, affirming that of Mr. C. McDonald, Principal Sudder Ameen of that district, dated 15th May 1857, in the case of

Tillukchunder Shahoo, *Plaintiff*, Petitioner,
versus

Luchmeenarain and others, *Defendants*, Opposite Party.

Baboos Ramapersad Roy and Shumbhoonath Pundit and Moonshree Ameer Alee, for Petitioner.

Baboo Kishenkishore Ghose and Mr. R. T. Allan, for the Opposite Party.

THIS suit was instituted by petitioner to recover possession of mouza Munsoorgunge, with dakhilee villages attached, and also four other portions described as kittas. Case remanded to the lower appellate court to try an issue upon a title set up in appeal before him, but not adjudicated upon.

Both the lower courts have dismissed the suit ; and the ground of special appeal is, *first*, that the judge has given an imperfect opinion upon the evidence adduced by petitioner as to his title ; and, *second*, that the judge has not enquired into the question of possession. Upon these points, however, it appears to us that no special appeal is open. The judge has given a conclusive opinion with respect to the petitioner's title to mouza Munsoorgunge, and that title, as laid, being thrown out, it seems to us no further enquiry was necessary.

But upon a *third* point the judge's decision appears to us to be incomplete. Besides Munsoorgunge, petitioner, plaintiff, claimed four other kittas, tracing the title of their vendors to a different source than that from which Munsoorgunge was derived ; and clearly from the mode in which his appeal was put to the judge, he invited a decision upon his claim to those kittas on a title different from that upon which he claimed Munsoorgunge. Petitioner said that Munsoorgunge had been sold to his vendor by Purusnath in 1220 ; but not so as to the other four kittas, for example, Kooskeenath was said to have purchased kitta Dewanchuk from different parties.

Upon the whole, then, it seems to us that the case must go back to the judge, to be reconsidered with reference to the four kittas, that is, to consider whether or no they were included in the kubala of 1220, which he has already rejected, and, if not so included, why judgment should not be given in plaintiff's favor.

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THE 5TH MARCH 1859.

A. SCONCE, ESQ., Judge, and H. V. BAYLEY, ESQ., Officiating Judge.
Petitions Nos. 1081, 1082, 1083, 1174, and 1180 of 1858.

Applications for Special Appeal from the decision of Mr. H. S. Thompson, Principal Sudder Ameen of East Burdwan, dated 22nd April 1858, affirming that of Moonshee Gopaulchunder Ghose, Moonsiff of Mohummudpore, dated 24th December 1857, in the case of

Joykishen Mookerjee, Plaintiff,
versus

The Collector of East Burdwan, (with others,) Defendant, Petitioner.
Baboo Ramapersad Roy, for Petitioner, *Ex-parte*.

Suits in regard to thanadaree lands, remanded upon the precedent cited.

It is hereby certified that the said applications are granted on the following grounds.

We remand these five cases, as precisely similar cases have been remanded under the decision of this Court, dated the 28th June 1858, page 1192; and they are to be adjudicated in the manner laid down in the precedent cited.

THE 5TH MARCH 1859.

A. SCONCE, ESQ., Judge, and H. V. BAYLEY, ESQ., Officiating Judge.
Petition No. 1472 of 1858.

Application for Special Appeal from the decision of Mr. H. S. Thompson, Principal Sudder Ameen of East Burdwan, dated 15th June 1858, affirming that of Moulvee Syud Tofuzzul Ruhman, Moonsiff of Pothna, dated 31st December 1856, in the case of

Bonomallee Samunt and others, Plaintiffs, Petitioners,
versus

Putnee Beebee and others, Defendants.

Baboos Ramapersad Roy and Kishenkishore Ghose, for Petitioners.
Baboo Obhoychurn Bose, for the Opposite Party.

Case remanded, as the judgment below was defective, as the point, whether the area covered by the pottah was a larger or a smaller area, was not adjudicated.

It is hereby certified that the said application is granted on the following grounds.

The special appellant sued to assess rs. 295-8-6½ on 97b.-10½c. of land, alleging it to be held by defendants on an inadequate jumma.

The defendants pleaded a pottah of 1243 B. S., based on pottahs of 1234 B. S. and 1229 B. S., fixing his jumma at 76-14.

The moonsiff held the pottah to be sufficiently proved, and the principal sudder ameen has upheld his decision.

The plaintiff appeals specially, urging, 1st, that the pottah pleaded covers only 58b.-8½c. and cannot be valid for the *bs.* 97-10-5; and that this point was made an issue by the moonsiff, but omitted to be adjudicated by him; further, that the omission was brought to the notice of the principal sudder ameen, and that officer has, notwithstanding, not taken up the matter; 2ndly, that the principal sudder ameen has gone upon the authenticity of the signature of *one* plaintiff, whereas *three* plaintiffs appear in the case.

As this second plea was not taken below, we do not think it right to take it up for the first time now; but as we find, on a reference to the record, that there is clearly a defect in the judgment of the principal sudder ameen on the first point, we remand the case to the principal sudder ameen, in order that he may re-try it, with reference to whether the pottah pleaded by defendants secures them from plaintiffs' claim for 97b.-10½c., or is for 58b.-8½c., or to what extent.

Remanded accordingly.

THE 7TH MARCH 1859.

B. J. COLVIN and A. SCONCE, Esqs., Judges, and C. B. TREVOR, Esq.,
Officiating Judge.

Case No. 203 of 1855.

Review of Judgment passed by Messrs. B. J. Colvin, A. Sconce, and J. S. Torrens in the above case, on 30th January 1858, and admitted to review on 4th August 1858, (vide page 1361 of the printed Decisions of that month).

Ramkishore Acharj Chowdree, (Plaintiff,) Appellant,
versus

Bhoobunmoyee Debea Chowdrain and others, (Defendants,) Respondents.

The Advocate General and Baboos Ramapersad Roy, Kishen-kishore Ghose, and Kaleeprosunno Dutt, for Appellant.

Messrs. J. W. B. Money and R. T. Allan, Baboos Shumbhoo-nath Pundit, Unnodapersad Banerjee, and Bungsheebuddun Mitter, Moonshee Ameer Alee, and Moulvee Lootfoor Ruh-man, for Respondents.

Suit laid at Company's Rupees 2,17,539-12a.-2p.-4k.

Mr. A. Sconce.—The appellant now before us, Ramkishore Acharj, has brought this action as son of Gourkishore Acharj, adopted with his permission by his widow, Chundrabullee, to establish his right to succeed to the estate of Gourkishore in consequence of the death of his natural born son, Bho-wanekishore. Already this case has, on two different occasions, Suit by A, as adopted by B, under a power of adoption granted by her deceased husband C, to succeed to his estate on death of

I), the natural born son of C.

Held, that the best evidence of which a case is susceptible should be offered, and secondary evidence, which is merely substitutionary in its nature, should not be received so long as original evidence is attainable. Moreover, a party in whose power a deed has been, should give satisfactory evidence of its loss or destruction before secondary evidence can be properly admitted. If, however, it be shown, as in the present case, that the production of primary evidence is out of the party's power, secondary evidence is admissible.

Held, that the doctrine of implied revocation can only be legitimately inferred regarding a lost or missing instrument, which has always remained in the power of the party making it; that, consequently, both from the delivery of the deed from C to his wife B, and also from the object of the deed, revocation by C in the present case is not to be inferred.

Held, that the absence of the original deed, or its suppression by B, or her temporary action in opposition to it, cannot extinguish the power created by her husband C.

Held, that the evidence of witnesses, not named in the deed, is not necessarily inadmissible; and that, with reference to the lapse of thirty-five years from the date of the deed, to the presumption of the death of the witnesses to the deed, as asserted by plaintiff and not rebutted by defendant, to the formal registration of the deed, two years before C's death, in repetition of a similar power previously registered, and to the legal efficacy of a verbal power, the grant of the power by C is proved.

Held, that the delivery of A by his natural father, jointly with his wife, in his life-time, to B as her adopted son, is proved; and that the question of impurity said to attach to the giving of A by his natural mother, on the day following her husband's death, cannot, in this case, properly be raised.

Admitting plaintiff to have been of the age of twelve years at the time he was given in adoption, held, that he, being a brahmin, and the nephew of his adopting father, the initiatory ceremony of investiture not having been previously performed, his adoption was valid.

Held, that by the death of D, the natural born son of C, without issue, A is legally, under the deed of permission, entitled to take his estate as against E, the widow of D.

Held, that the deed of permission said to have been executed by D in favor of E, and the adoption of defendant by E, under the power alleged to have been granted by her husband D, are not proved.

and the adoption of defendant under it, were legally valid : and, being satisfied from the cause shown by the plaintiff's counsel that they should have an opportunity of taking the opinion of the Court upon that matter, I admitted the re-entertainment of the appeal, that the issues not before gone into might be adjudicated upon.

For the purpose thus indicated, the case has been again heard. Granting that the plaintiff's title cannot legally be brought into competition with the title of one who might have been legally adopted by the widow of Bhowaneekishore, it is contended for appellant that, failing the born or adopted male issue of Bhowaneekishore, the adoption of plaintiff must have the effect of vesting the inheritance in him ; and, accordingly, it has been the leading object of the counsel for appellant, at the present hearing, to impeach the validity of the defendant's adoption. Necessarily, however, in pursuing this course, it was incumbent on plaintiff, appellant, first to adduce proof of the sufficiency of his own adoption : and thus the issues which we have now to determine, are, *first*, the validity of the plaintiff's adoption ; and, *second*, the validity of the defendant's objection.

Gourkishore Acharj, it is admitted, died in the year 1228, leaving a widow, Chundrabullee, and a son, Bhowaneekishore, born to them. It is also admitted that Bhowaneekishore died on the 14th Bhadbro 1247, leaving no issue, but a widow, Bhoobunmoyee. For the plaintiff it is asserted that, about two years before his death, or on 25th Kartikh 1226, Gourkishore executed an unoomotee puttro or power of adoption in favor of his wife, Chundrabullee, and that she, in the exercise of that power, on 31st Bysakh 1251, adopted the plaintiff, Ramkishore Acharj, son of Gokoolkishore Acharj, her husband's brother. On the other hand, it is said on the part of defendant, that Bhowaneekishore, on 12th Bhadro 1247, that is, two days before his death, executed an unoomotee puttro in favor of his wife Bhoobunmoyee, and that Bhoobunmoyee, on 20th Aughun 1250, adopted the defendant, Ramkishore Acharj.

At the threshold of the plaintiff's case, obstacles to further progress are raised upon the non-production of the original unoomotee puttro of 25th Kartikh 1225. A deed, bearing this date, which corresponds with the 9th November 1819, was registered in the office of the register of deeds on the 12th November 1819 ; and what, in lieu of the original, plaintiff offers, is an authenticated copy of the registered deed, and also the exact copy of the deed which Clause I, Section II. Regulation XX. of 1812 required to be furnished on, the presentation of the original, and which, as required by law, bears the endorsement of the register made at the time of presentation. Against the reception of this substitute or these substitutes for the original deed, it was contended by the learned counsel for respondent, that plaintiff's failure to state in the plaint

that his claim was founded on a copy, not on the original, necessitates the rejection of the copy ; and that the copy cannot be received unless cause be shown for the absence of the original. In support of these pleas we are referred to the decision of this Court, reported at page 368 of the Decisions of 1852. In that case the plaintiff had filed copy of the deed founded on, which, she said, had been given to her by the party who held the original ; and the majority of the Court objected to the reception of the copy on mixed grounds, that is, partly because the absence of the original was not accounted for, and partly, because the pleadings did not specifically show that the suit was founded on a copy. But it is not clear that, for the latter reason alone, the Court would have come to the same conclusion. I will not say that explanation in the plaint on such a point as this may, without irregularity, be withheld ; and, indeed, the point can scarcely arise under the present law, Section XVII. Act X. of 1855, which requires the deed founded on to be filed with the plaint. But it seems to me the only general rule that may fairly be predicated is, that the non-disclosure of the absence of an original may materially affect the opinion to be formed of the authenticity of a copy that may subsequently be adduced. Here, however, the circumstances greatly differ from those of the case decided in 1852. Plaintiff is the adopted son, and he comes into court by virtue of his presumed adoption : but the unoomotee puttro was addressed to Chundrabullee : she was its proper custodian, and, certainly, as I think, though the plaint omitted to declare that plaintiff had not in his own hands the original unoomotee puttro, we are not entitled to reject the registered copy. Later in the proceedings plaintiff applied to the principal sudder ameen to cause Chundrabullee, his adopting mother, and a defendant in the action, to produce her unoomotee puttro ; but the application was not formally acceded to. At different times Chundrabullee, through her pleader or mooktear, gave different explanations regarding this deed : at one time saying that she would ; at another, that she could not produce it ; but the result was, that it was not forthcoming. Mr. Money, likening the unoomotee puttro to a will, asked us to presume the destruction of the deed by the grantor. But, in truth, an unoomotee puttro is essentially distinct from a will. The latter must be supposed to remain in the custody and power of the testator, whereas an unoomotee puttro is a deed addressed to a second party, the wife, in the life-time of both, and ostensibly passes beyond the control of the husband. Moreover, in this case the registry purports to have been effected by the instrumentality of both husband and wife, and, on completion, the delivery of the deed to the wife is manifested by the recorded mooktearnamah given to her agent for that purpose. I have not now to consider whether an unoomotee puttro may, or may not, under any circumstances, be

revoked. I speak only of the presumption arising in the present case, as it affects the non-production of the original deed by the plaintiff. Besides, the tenor of the deed and the circumstances under which it was drawn are, it seems to me, quite against the presumption of revocation. The unoomotee puttro of 1226 professes to be a renewal of a similar deed of the year 1215, which stands registered in the office of the register for that year. In 1215 Gourkishore had no son; Bhowaneekishore was born in 1224; and the deed of 1226, referring to the birth of Bhowanee, purports to renew the power of adoption to come into effect provisionally, that is, failing Bhowanee, the lately born son. The manifest object of Gourkishore was to provide for the succession to his estate, through Bhowanee, or, him failing, through an adopted son. Gourkishore died in 1228; and without anticipating the question of authenticity, I would say, that the natural presumption is, that his wish to provide for the eventual adoption of a son continued as strong at that time as in 1226.

Not only is it presumable that Gourkishore Acharj did not revoke the unoomotee puttro before his death, but we have some reason to apprehend, from the facts asserted by the defendant, that Chundrabullee at one time had, or conceived that she had, an interest in making away with the deed executed by her husband. Bhoobunmoyee, widow of Bhowaneekishore, it has been already seen, first undertook to adopt a son. Defendant was adopted on the 20th Aughun 1250; plaintiff not till five months later, on the 31st Bysakh 1251. By the deed of adoption set up by Bhoobunmoyee, excepting some villages wholly assigned to her, it was provided that Chundrabullee should hold one-half of the estate till the son adopted by Bhoobunmoyee came of age. Now Bhoobunmoyee deferred the adoption of defendant from her husband's death in 1247 till 1250. In the mean time she and Chundrabullee gave joint effect to the deed said to have been executed by Bhowaneekishore, by carrying on suits in their joint names, and by substituting their names in the collector's register of estates, as proprietors in possession of the property held by Bhowaneekishore to his death. Thus, I cannot doubt that at one period Chundrabullee conceived that she had an interest in adhering to the unoomotee puttro set up by her daughter-in-law; and, taking this view of her own interest, she may be supposed, in furtherance of the arrangement, to have agreed to get rid of a deed which might afterwards have been used to prostrate it. This is a possible explanation of the absence of the original unoomotee puttro of 1226. But whether the deed disappeared from this motive, or under other circumstances, I apprehend there can be no doubt that its disappearance from the custody of Chundrabullee, after her husband's death, cannot extinguish the power which her deceased husband had created. Possibly, the power might lapse by

non-enforcement. That is another matter. So the destruction of the original deed may interpose greater or less difficulty in establishing the grant. But the mere suppression of the deed by the widow cannot have the effect of extinguishing a power that originally emanated, not from her, but from her husband.

For all these reasons, it seems to me, the plaintiff should be held competent to use in evidence a copy of the registered unoomotee puttro. In short, he cannot help himself: and to us, it seems to me, the paramount object for determination should be the execution of the unoomotee puttro by Gourkishore Acharj, irrespective of any act by which Chundrabullee, after his death, may have suffered the deed originally entrusted to her to be suppressed or lost.

The execution of the unoomotee puttro of Kartikh 1226 is proved to us by three witnesses, Chundeeersad, Hurkant, and Juggurnath. These men profess to have been present, but their names are not among the names of the witnesses recorded in the deed: and it was argued for respondent, both that the evidence of these three men could not be received at all, and that it could not be received unless the inability of the witnesses named on the deed to attend were accounted for. No doubt, while both in Regulation XXXVI. of 1793 and Regulation XX. of 1812 it is declared that, in the event of the original deed not being forthcoming, the registered copy shall be received as sufficient evidence of the original in all courts of justice, it is added, "proof being made by the subscribing witnesses to the original deed, that the original was duly executed." But I apprehend that, by the use of these words, no more is intended than that, on the presentation of a copy as evidence in lieu of the original, proof of the execution of the original deed should nevertheless be necessary. It is not meant, I think, that better evidence would be required in one case than the other, or to exclude evidence in proof of the copy which would not have been excluded in proof of the original. And again, it seems to me, that we cannot reject the evidence of the three men above named, because, though present, they were not subscribing witnesses. Their evidence is not secondary evidence properly so called. It is equally direct to the execution of the unoomotee puttro as the evidence of subscribing witnesses. The necessity to record evidence upon this point arose thirty-five years after the date of the deed. That the subscribing witnesses have died, as is said, though not proved, is not improbable: the statement is not in any way rebutted by defendants; and, at any rate, our proper course is not to exclude the evidence of Chundeeersad, Hurkant, and Juggurnath, but, it may be, to attach less credibility to it than if it had been corroborated by the evidence of one or more of the subscribing witnesses. Besides the admissibility of this evidence may be sustained on other grounds. An attested deed is not essential to the validity of a power of adoption—a verbal power may be a good power. And thus evidence,

which should not possibly be allowed, without special cause, to authenticate a deed, may be admitted to show that, to the knowledge of the witnesses, the donor of the power wrote as well as spoke his wishes.

The three witnesses named attest, as I have said, the execution of the deed by Gourkishore Acharj ; and it seems to me that the fact of registration of the deed, attested at the time by two witnesses, two years before Gourkishore's death, creates, under the circumstances of this case, the very strongest presumption of its authenticity. By registration an *authentic* copy of the original is secured, and a *fac simile* or duplicate of the original on plain paper, also attested by the register, is on record. We have had no suggestion whatever thrown out that would favor the presumption that the unco-motee puttro of 25th Kartikh 1226 was forged, or was registered without Gourkishore's assent. At the time, his son Bhowanee was two years old : no such dispute as has now arisen could have been anticipated : a similar power had been registered so far back as 1215 : the purport of the later deed, not in any way prejudicial to his born son, but to provide for the contingency of his death, which it so solemnly deprecates, is simple and truthlike : and it would approach the extreme verge of improbability to assume that Chundrabullee, without her husband's act and knowledge, had caused the deed of either or both years to be drawn and registered.

Holding then Chundrabullee to have been empowered by her husband to adopt a son, I come to consider the effect which she has given to that power by the adoption of plaintiff. The statement is, that Gokoolkishore Acharj (brother of the deceased Gourkishore), by a deed, dated 15th Bysakh 1251, empowered his wife to give in adoption to Chundrabullee his younger son, Ramkishore, this plaintiff : that Gokoolkishore died on the 30th Bysakh ; but before his death, both husband and wife together gave over Ramkishore formally to Chundrabullee, with a view to his adoption, and that, on the following day, the 31st Bysakh, deeds to that effect were exchanged between the two widows. In support of these successive facts we have the evidence of several, apparently unexceptionable, witnesses.

First may be mentioned Indurnarain Ghose, who says that, under Gokoolkishore's directions he wrote the deed of 15th Bysakh 1251, and that Gokoolkishore signed it. Kaleekishore, the general mook-tear of Gokoolkishore, says that Gokoolkishore sent for him before his death, and told him that he had, by a deed, empowered his wife to give the plaintiff in adoption ; that, on the day of his death, before he died, the boy was actually given, and that next day the widows exchanged deeds. Ramlochun and Shibnarain speak to the deed of 15th Bysakh, to the actual delivery of the boy on the 30th, before Gokoolkishore's death, and to the exchange of deeds on the 31st. Such is the direct evidence offered by plaintiff in support

of the fact of his own adoption. But, indeed, of the last transaction in the series we have now no question. It is admitted by defendant that, on 31st Bysakh, the natural mother, Hurrosoonderee, and the adoptive mother, Chundrabullee, executed the deeds which set forth the giving and taking of the plaintiff on that day ; but the defendant, respondent, contends that Hurrosoonderee acted without her deceased husband's consent. It seems to me, however, that we have no good reason for withholding our belief in the depositions of the witnesses adduced by plaintiff, and that the witnesses accordingly must be held to prove both the general power to give in adoption as manifested in the deed of 15th Bysakh, and the actual transfer of his son, the plaintiff, to Chundrabullee, by Gokoolkishore, on the 30th Bysakh, before his death. Two circumstances seem to afford material corroboration of the presumed assent of the father. One is, that the defendant allows that Gokoolkishore was desirous that his son should be adopted by Bhoobunmoyee, which she refused, as the boy was over age. And, again, by this time, the difference between Bhoobunmoyee and Chundrabullee had broken out ; the deed of 31st Bysakh recites the previous acts done by Gokoolkishore in his life-time ; and the probability seems to be that care would be taken to do the acts said to have been done, so as to meet effectively the opposition they were likely to encounter. My conclusion from the evidence being, then, not only that Gokoolkishore had permitted his wife, at some future date, to give, but before his death had personally joined in giving, his son Ramkishore, plaintiff, in adoption to Chundrabullee, the legality of the transaction cannot be embarrassed by the *imputation of impurity* which (defendant) respondent says should affect it, if the gift of Ramkishore had been first made by his natural mother on the day following her husband's death. Indeed, even upon this last supposition, the respondent's counsel have brought before us no authority to establish the illegality of the assignment of her son by Hurrosoonderee ; and I should rather hold that, if the act were, in a religious sense, sinful, the transaction being as between the parties actually done, the civil contract should be affirmed. But, as just observed, taking the fact to be that Gokoolkishore gave his son in his life-time, the question of *impurity* does not arise.

The next point for consideration is the validity of plaintiff's adoption, in so far as it is affected by his age. Assuming plaintiff's age at the time of his adoption to be over five years, it is said on the part of (defendant) respondent that the adoption is illegal. Upon the whole, it appears to me to be most probable that, in the beginning of 1251, plaintiff was about twelve or thirteen years of age. The most conclusive evidence adduced on this point, amid much that is conflicting in the statements of the witnesses, is that of

the principal sudder ameen himself. This officer saw plaintiff, and, from the appearance of maturity which his countenance presented, he was of opinion, as he records in his proceeding of 7th December 1853, that Ramkishore was then twenty-two or twenty-three years of age. He says also, that he had consulted the civil surgeon, who was of opinion that the young man was not under twenty. Supposing, then, plaintiff to have attained twenty-one or twenty-two years in 1853, *i. e.* 1260, he should have been twelve or thirteen years old in 1251. But I apprehend that, even on this assumption, the adoption of plaintiff is not illegal. Here, it may be necessary to remark, that, at the hearing of this appeal, we have had no question raised as to the performance of the ceremonies requisite to a valid adoption. The performance of the necessary ceremonies appears to be admitted; and the objection taken by (defendant) respondent is not that the ceremonies consequent upon the adoption of plaintiff determine its invalidity, but that he was over age. The conclusions presented by Sir W. H. Macnaghten, in his *Principles of Hindoo Law*, are, that the investiture of a boy with the characteristic cords should be performed in the family of the adopting father; that, in the case of a brahmin, to which class the parties before us belong, ordinarily investiture should take place when the boy is eight years of age, but that it may be postponed till the sixteenth year. Following, apparently, this view of the law, this Court held, in the case of Kherutnarain, reported at page 161, volume I. of the Select Reports, that the adoption of a boy of above five years of age, though the selection be not laudable, is valid, provided the initiatory ceremonies have been performed in the family of the adopter, and not in that of his natural father. I repeat, with respect to the ceremonial observances attendant upon the adoption, we have had no controversy. On the part of plaintiff, we have proof of the adoption done; on the part of defendant, no proof of circumstances that should invalidate that act. Plaintiff's evidence, on this point, is unimpeached; and my conclusion is, that the adoption of plaintiff, done at the time he was twelve or thirteen years of age, is not invalid.

I have still another point to notice before concluding the consideration of the plaintiff's case. Admitting, it is said, the legal sufficiency of the plaintiff's adoption as the son of Gourkishore Acharj by his widow, and reserving for future determination the validity of the defendant's adoption, it has been contended that, as against Bhoobunmoyee, widow of Bhowaneekishore, plaintiff's title as heir at law cannot be accepted. The inheritance, it is argued, vested absolutely in Bhowaneekishore, and, on his death, failing a son, Bhoobunmoyee succeeds. I take it undoubtedly to be unquestioned, that the inheritance devolving, by the ordinary operation of law, upon a son, minor or major, at his father's death, is absolute. As in the father, so in the son the right of property completely vests.

And so again, on the son's death, the ordinary law of inheritance (supposing no question of special appropriation) would have its course. Under such circumstances, to suffer the ordinary course of inheritance to be interrupted by the interposition of adoption, may at first sight appear anomalous; but I apprehend that the anomaly, if any, arises, not with the interruption to the legal course of succession, but to the introduction of a person, after the death of a father, and after the death of his begotten son, to stand in the relation of a real son to the father. It is, however, a father's legal right to provide that, after his own demise, and after natural procreation is impossible, a living son, if he die, shall be replaced by an adopted son. Adoption may be an abnormal mode of continuing a lineage; but it is wholly lawful. Adoption creates a son standing towards his father not less a son than a begotten son; and it seems to me, the necessity of his position is, that he shall fall into the inheritance which has become vacated by the death of his begotten brother. To withhold the inheritance would be to withhold the recognition of the character of a son, and to defeat the relationship which it was the object of the adoption to create. In fact, the express policy of the law of prospective adoption under a power conferred by a Hindoo, on his wife, must be—a begotten son failing—to turn the current of succession, and to vest the son eventually adopted, in conformity with the provisions of the power, in his father's estate, as next heir. We have no question, in the view of the case to which I now confine myself, of any curtailment of Bhowanee's absolute enjoyment of the estate, or the deprivation of his issue. Bhowanee dying childless is replaced by an adopted brother; and he being, so to say, his father's son, is entitled to a son's inheritance over other less near heirs. A case which bears a very close analogy to the present with respect to the title of inheritance arising on the demise of a begotten son, will be found discussed by Sir Francis Macnaghten, at page 168 of his work, *Considerations on Hindoo Law*. Lukheearain Tagore died, leaving three widows, one of whom was *enceinte* at his death, and, in the event of the death of the child about to be born, he empowered his widows to adopt another son. In due time the pregnant widow was delivered of a son, but he died seventeen days afterwards; and upon that event his mother filed a bill in equity *as heir to her deceased son*, to be put in possession of the estate of her husband Lukheearain. Eventually, however, the power to adopt, and the adoption made under that power, were affirmed, and the bill of the widow, who, but for the adoption, would have come in as her son's heir, was dismissed. Then as here there could be no doubt of the devolution of the absolute estate on Lukheearain's begotten son, but him failing, the title of the adopted son became paramount in next succession. Confining

ourselves strictly to the circumstances of the case before us, it seems to me that we have no authority for assuming that, though the unoomotee puttro of his father might have been effectual ten or fifteen years sooner, it ceased to have effect at the time of Bhowanee's death. Bhowanee died about the age of twenty-three years. We cannot, as I think, say, that he had then acquired a more absolute right in his father's estate than he had acquired at the age of ten. It is not a question of time, as if Bhowaneekishore had one kind of right at ten, another kind at eighteen, when he became a major, or possibly at any period between these ages when he married. But rather, in order to determine the effect of Gourkishore's unoomotee puttro, we have to consider whether the succession hoped for by him in his begotten son, Bhowaneekishore, has failed: and being satisfied of that fact, the power provided by Gourkishore for the adoption of a son has necessarily revived.

For these reasons it seems to me that, so far as I have yet proceeded in the consideration of this case, plaintiff, appellant, has made good his own title; but, under the conclusion already enunciated, the plaintiff's right as the son of Gourkishore can arise only in the event of the lineal succession through Bhowaneekishore *failing*: and we have still to see whether Bhowaneekishore be now represented by a legally adopted son. Bhoobunmoyee, widow of Bhowaneekishore, sets up an unoomotee puttro, dated 12th Bhadro 1247, as her authority from her husband to adopt a son, and in conformity with this power she adopted Rajendurkishore on 20th Aughun 1250. This deed purports to have been executed before Bhowanee's death. It is attested by several persons named as witnesses on the deed itself, and by others who profess to have seen it delivered by the donor. In estimating the evidence of these witnesses, I feel the very great difficulty of simply pronouncing upon its credibility from an examination of the words used by the witnesses themselves, and I desire rather to test its sufficiency by extraneous circumstances. The deed of 12th Bhadro 1247 is written on stamp paper of seventy rupees' value, of which the endorsement bears that it was sold by Juggurnath, a mohurri of the collector's office, on the 24th August 1840, or 10th Bhadro 1247, to one Ramcoomar Pal. The correctness of this endorsement is accepted as a fact on both sides. Now the plaintiff, appellant, points our attention to the filed copies of the collector's accounts of stamps in store, and sold for the months of July, August, and September. The account for July shows that, at the beginning of the month, no stamps of the value of seventy rupees were in store; but that, in the course of the month, a remittance of two stamps of that value had been received. In the account of August the two seventy-rupee stamps received in July were brought forward, and at the close of the month these two stamps remained unsold in

store. The account for September shows that the two seventy-rupee stamps were sold in that month, and, what is more, a copy of the collector's roznamcha or daily delivery of stamps shows that, on the 12th September or 29th Bhadro, these two stamps were given out for sale. The question before us then is to determine the connection of the stamp of the unoomotee puttro, which was bought according to its endorsement on 10th Bhadro 1247, with the stamps of the same value actually sold on 29th Bhadro. Clearly a stamp not given out of the collector's store till 29th Bhadro, that is, fifteen days after Bhowanee's death, could not have been used for a written deed on 12th Bhadro, except on the supposition that it was ante-dated. Stamps are disposed of by collectors ordinarily in two ways: either through vendors constituted for that purpose, to whom the stamps delivered for sale are at once passed out of the collector's accounts, or through an establishment retained in the collector's office for that purpose. In the present case we have no difficulty. The channel of a vendor was not used. The stamp of the unoomotee puttro purports to have been purchased from the collector's mohurrir, not from a vendor, who might be supposed to have had a store of stamps of large value exclusive of those held by the collector. The store of stamps of high values in the collector's treasury is, as everybody knows, limited to the rare demand of the community; and the accounts for July, August, and September, now before us, represent the position of the Mymensing office for these months. There seems to be no room to doubt that, in the month of August, two seventy-rupee stamps only were in store: that none were sold in the course of that month: and that the two stamps of that value, which were remitted to the collector in July, were not delivered from his repository till the 12th September. It is said that, some time before, the collector's treasurer had been removed from office on the ground of embezzlement, and that the accounts of the stamp department were in confusion. If we had to deal with 2-anna, 4-anna, or 8-anna stamps, of which the store amounts to thousands, we might have occasion to make some allowance upon this head. But the seventy-rupee stamps now under discussion were received after the treasurer's removal; and necessarily any perplexity that may have arisen in his time could not apply to stamps of large and exceptional values subsequently received by the collector in anticipation of rare demands, and given out as these demands were made. If this plea mean anything, it means that the two monthly accounts of August and September were wrongly drawn up: this, as a mere statement of error, is not to be presumed; while, on the other hand, the correctness of the accounts is corroborated by the detailed daily delivery account for September, which shows, as already said, that, on the 12th of that month, the two stamps were given out of store. Some doubt arises

as to the identity of the stamps of the unoomotee puttro with one of those sold in September, from the circumstance that the former bears on its back a different number from those sold. The sizes of stamps are marked by numbers. The seventy-rupee stamps in store in August are included in the column of No. 3 stamps, whereas, on the back of the unoomotee puttro the Bengalee figure 2 is given. Here is an apparent discrepancy, but it may have been accidental ; and while, on the one hand, the collector's accounts of stamps in store and sold for successive months are in themselves unexceptionable, on the other, as the mohurrir, who could not have sold the stamp before the 12th September, necessarily lent himself to a fraud in dating the sale on the 24th August, so he may have attempted to throw mystery on the transaction by writing on the paper No. 2 instead of No. 3.

In connection with the same subject, the apparent history of the fate of the second of the two stamps for seventy rupees is worthy of notice. A stamp of that value, purporting, like the foregoing, to have been sold on the same date, by the same mohurrir, to the same purchaser, Ramcoomar Pal, is filed by a witness of the plaintiff. He and another witness, who profess to have knowledge of the fabrication of the unoomotee puttro of 12th Bhadro 1247, say that the deed was first copied out on this second paper, but that blunders occurred, and the deed was written afresh on the other paper. The two papers bear corresponding endorsements, and are apparently of the same size and time. Of the purchaser, Ramcoomar Pal, we know nothing. Bhoobunmoyee does not show how a stamp purchased by him came into her hands ; and it seems to me the apprehension of false dealing on her part is strengthened by the absence of explanation on this point.

For the plaintiff evidence is offered to show that Bhowanee-kishore had gone on a hunting expedition : that he returned ill of fever : that on 12th Bhadro (the date of the unoomotee puttro) he was unconscious, and on the 14th died. The death of Bhowanee on 14th Bhadro is admitted. But while, in the answer of Bhoobunmoyee and in the deposition of her witnesses, it is allowed that Bhowanee had returned ailing from hunting, he is said to have recovered and to have been carried off by a fresh accession of illness, after the execution of the unoomotee puttro. The witnesses, Golukchunder Dass, Gopeenath, and Golukchunder Chuckerbuttee, say plainly that Bhowanee was quite well when he executed this deed ; and, indeed, Gopeenath gives us the assurance, peculiar, so far as we heard, to himself, that the day before his death Bhowanee had, at a friend's shradh, eaten too much goat's meat, and died from the violent fever that ensued. Now it seems to me to be remarkable that these after-statements are opposed to the tenor of

the deed itself, which commences by reciting that Bhowanee, being ill, had thought fit, in case of accident to himself, to provide for the adoption of a son. These depositions appear to be overdone, and, looking to what the plaintiff's witnesses tell us on the same point, I infer that Bhowaneeekishore was too ill on his return home to have executed this deed.

Again, the terms of the unoomotee puttro are of a peculiar character. It assigns certain villages to Bhoobunmoyee as maintenance for life, and directs the remainder of the estate to be held, half and half, by Bhoobunmoyee and Chundrabullee, till the boy to be adopted by Bhoobunmoyee should become of age; providing at the same time that the two widows should each pay half of Bhowanee's debts. The chief feature in the deed is therefore manifestly to constitute Bhoobunmoyee and Chundrabullee joint tenants till the adoption of a son by the widow of Bhowanee, and even after that adoption, till the boy adopted should attain his majority; that is, excepting the villages given to Bhoobunmoyee herself; in other respects, the two widows have joint and equal interests in the estate. Now it happened that, at the time Bhowaneeekishore died, an appeal, to which he was a party, was pending in this Court; and we are shown from a proceeding of this Court, dated 25th Bhadro 1247, or the 8th September 1840, that notice of Bhowanee's death had been given by his pleader, to the effect that Bhowanee had left a widow as malik of the estate, with power to adopt. Necessarily, as Bhowanee had died on 14th Bhadro, very early information of his death had been sent down, and the terms of the notice sent being wholly silent as to the joint interests of Chundrabullee in her son's estate, under the unoomotee puttro, seems to me to support the conclusion to which I come on other grounds—that at the time of Bhowanee's death, and for a short time subsequent thereto, the deed afterwards disclosed by Bhoobunmoyee had not been prepared. A somewhat similar inference arises from a suit pending in the zillah judge's court. There, too, early intimation had been given of Bhowanee's death by the pleader in the cause, but the record is silent as to any disclosure made in the first instance of the provision made by Bhowanee for his succession.

The unoomotee puttro, as has been shown, savors less of the exercise of a right on the part of Bhowaneeekishore than of compromise between the two widows failing any deed executed by him. By this deed, it must be allowed, the good will of Chundrabullee was for the time conciliated. The strongest part of the defendant's case is, that for about three years Chundrabullee accepted and acted under the deed. But being called upon, as we now are, to determine between the conflicting title asserted under the deed of Gourkishore, and under the deed of his son Bhowanee, it seems

to me that the temporary assent, shaped by the temporary interest of Chundrabullee, cannot be suffered to vitiate the right of plaintiff as the lawfully adopted son of her husband.

I would accordingly give judgment in favor of plaintiff, appellant, with all costs of suit chargeable to the defendant, Bhoobunmoyee. Wasilat will also be awarded to plaintiff from the date of suit, as the amount may be afterwards ascertained, with interest from the commencement of each succeeding year.

Mr. C. B. Trevor.—This case was first before the Court on the 30th January 1858, when the majority of the Court, assuming that both the deeds of permission propounded and the adoptions under them were *bond fide* and valid, held as a point of law, on a consideration of the terms of the deed of permission executed by Gourkishore Acharj, that the permission to adopt set up by the plaintiff, appellant, as having been granted therein to his mother, Chundrabullee, was conditional; that the conditions contemplated had not occurred; and, therefore, that the deed by its terms did not supersede the legal right of the natural son, so as to restrain him from authorising his widow to adopt a son who should succeed to the ancestor's estate. As, therefore, the natural son had, on this assumption, rightly adopted a son, the plaintiff's suit was dismissed.

On the 4th August 1858 the Court granted, on grounds stated in the order of admission, a review of its judgment; and as the review opens up every question of fact and law arising out of those facts, I proceed at once to the consideration of the whole case.

Plaintiff* alleges that Gourkishore Acharj, the husband of Chundrabullee, the defendant, being childless, to secure the performance of the necessary obsequial rites, and at the same time to preserve the succession to his estates, executed in favor of his wife a deed of permission, dated 27th Magh 1218 B. E., and had the same duly registered; that on the 22nd Pous 1224 B. E., that person had, by his wife, Chundrabullee, defendant, a son named Bhowaneekishore Acharj; that, subsequently, Gourkishore Acharj, knowing that he had an only son, who, according to the astrologers, had to struggle against the evil influences of a malignant star, and that, in the event of his death, there would be no one left to perform the obsequial rites and succeed to the management of his estates, executed to his wife a fresh deed of permission, in the nature of a testament, dated 25th Kartikh 1226 B. E., to the effect that, provided any mishap should befall his son, she, the more effectually to secure the observance of their funeral ceremonies and the preservation of the estate, should adopt a son; that in Assin 1228 B. E. Gourkishore Acharj dying left his wife and a son, Bhowaneekishore,

* The suit was first instituted by Ramkishore's elder brother, Gokoolkishore, as well-wisher to him during his minority. Ramkishore having since reached his majority, the case has proceeded in his own name.

him surviving ; that some of the estates came under the Court of Wards, and with the accumulated profits fresh estates were purchased ; that not long after the solemnization of the marriage of Bhowaneekishore, in Srabun 1247, he went out hunting to Sonakhali, where he contracted a fever, which reduced him to a state of insensibility on 10th Bhadro, and ended in his death on the 14th of the same month, leaving no offspring behind him ; that, whilst his mother Chundrabullee was in grief at the death of her only son, Ramkishto Rae, the sudder naib and maternal uncle of Bhoobunmoyee, Bhowaneekishore's wife, with the other amlah, with a view of subserving their own selfish ends, after the performance of Bhowaneekishore's obsequies, forged a deed of permission, alleged to have been executed by Bhowaneekishore shortly before his death, by which the estates were to be divided between his widow and Chundrabullee, until the son to be adopted by Bhoobunmoyee reached his majority ; that on the 13th Aughun 1250 Bhoobunmoyee proclaimed the adoption, by her, of Rajendurkishore Acharj, the son of Kaleekishore Acharj, under it ; that Chundrabullee, being apprised of the same, immediately petitioned the authorities, setting forth the unauthorised nature of the act ; and herself, acting on the deed of permission given to her by her husband, Gourkishore, before his death, adopted, in due legal form, the petitioner, having received him from his natural father, Gokoolkishore, before his death ; that, as the alleged deed of permission by Bhowaneekishore, under which the defendant has been adopted, and under which defendant has obtained possession of the property, is a forgery, and as plaintiff is the legally adopted son of Gourkishore, under the correct interpretation of the deed of permission granted to Chundrabullee by him, he now sues to set aside the forged deed of permission and the adoption made under it, and for possession, as his legally adopted son, of the estates, real and personal, of the deceased Gourkishore, with mesne profits.

The defendant, Bhoobunmoyee Debea, widow of Bhowaneekishore, pleads in answer, that the deed of permission set up by the plaintiff, at the pressing instigation of Chundrabullee, is a forgery ; that, even if it had been executed, it would have been null and void, seeing that her husband Bhowaneekishore, the natural son of Gourkishore, was living at the time of alleged execution ; that, moreover, her husband had succeeded at the death of his father to his property, real and personal, and that, previously to his death, he had executed a deed of permission in her favor ; that under the deed she had adopted as her son Rajendurkishore Acharj ; that, consequently, under the terms of the deed of permission put forward by the plaintiff, he is not entitled now to succeed ; that, subsequently to the death of her husband, her mother-in-law, Chundrabullee, and herself, took possession of the properties allotted to them under the deed of permission

and performed all the acts enjoined for their performance under it, as will be proved by numberless papers put in evidence ; that under the deed, the defendant, on 20th Aughun 1250, formally and legally adopted Rajendurkishore Acharj as her son ; that Chundrabullee, subsequently, at the instigation of designing persons, has adopted the plaintiff under an alleged permission from her husband ; that, nevertheless, the adoption so made is, for many reasons, invalid under Hindoo law ; that this suit, on the part of the plaintiff, is brought in collusion with Chundrabullee, with a view of setting aside the just rights of Rajendurkishore and herself, under the deed executed by her husband shortly before his death. She, therefore prays that the Court, enquiring into the circumstances of the case, will dismiss the plaintiff's suit, with costs.

The above is an abstract of the pleadings filed, which run to a very great length. The issues arising out of them are as follows :

1st. Is the fact of the deed of permission of 25th Kartikh 1226, alleged to have been executed by Gourkishore Acharj, proved or not ?

2nd. If it be, what is its legal significance ?

3rd. Has the adoption contemplated by it been made according to law, *first*, with reference to the act of giving and taking, and to the pure and impure condition of the parties so giving and taking ; and, *secondly*, to the age of the boy adopted ?

4th. Is the deed of permission to adopt, alleged to have been executed by Bhowaneekishore Acharj, a genuine and authentic deed or not ?

5th. If it be, is the adoption under it proved to have been rightly performed ?

6th. If both deeds of permission be proved, which adoption, under the deed of Gourkishore and Hindoo law, both or either, takes the precedence, that made by his widow Chundrabullee, or that by his son's widow, Bhoobunmoyee ?

A plea is raised in defendant's answer as to the legality of Gourkishore's deed of permission, inasmuch as at the time of its execution he had a natural son alive. This plea is of no weight. Without, therefore, discussing the point raised at length, it is sufficient to remark, that a permission to adopt a son, during the life-time of a natural or adopted son, is illegal under Hindoo law, as laid down by the Privy Council in the case of *Rungama versus Atchama* and others,* but a permission to adopt a son after the death, without issue, of a natural or adopted son, alive at the time of the execution of the deed, is quite legal ; and as, though raised in the pleadings, no stress has been laid upon the point during the hearing of the

* Moore's Indian Appeals, Vol. IV. pages 1—113.

case in review, it is unnecessary for me to cite authorities to support my opinion.

Before entering upon a consideration of the first and fourth issues, it is necessary to premise that it is abundantly proved by evidence before the Court that, *after* the death of Chundrabullee's son, Bhowaneekishore, she, in concert with his wife Bhoobunmoyee, put forth the deed of permission, now called in question by the plaintiff, as a true and genuine deed ; that she acted upon it ; that it was accepted by the courts as genuine ; that the parties named in it took possession of the properties devised to them as tenants for life, had their names registered as proprietors in the collectorate, and were sued and successfully sued for the debts of the deceased Bhowaneekishore ; and that it was only when quarrels had arisen between the mother and the wife of the deceased regarding, it is alleged, and probably with truth, the particular boy that should be adopted, that the former, acting upon the deed of permission to adopt, which she alleges that her husband Gourkishore executed in her favor, adopted the plaintiff in the present case. These facts must be kept in mind when considering the evidence produced by the plaintiff ; for although, on the supposition that the deed propounded by him, and under which he has been adopted, is a genuine one, the previous conduct of his adopting mother, Chundrabullee, and her acquiescence in the deed set up by the defendant, cannot affect his present rights, still it is only reasonable to presume *a priori* that that conduct must have interfered, to a greater or less extent, with the means of proof of title which, under other circumstances, he might have had in his possession ; and if, notwithstanding the present friendship between himself and his adopting mother, it should be found that such an interference has occurred, due allowance in considering the degree of proof adduced by the plaintiff must be made.

Looking, then, to the first issue, it is to be observed that the original deed of permission executed by Gourkishore has not been filed ; but in its place an authenticated copy of it, obtained from the office of the register of deeds, has been filed by the plaintiff, and the duplicate of the original deed, bearing the signature of the party executing the deed, has been called for by the lower court, at the instance of the plaintiff, and is on the record. Moreover, none of the witnesses to the original deed have been called ; neither, though their death is asserted to have taken place, has any proof been given that such is the case, and only witnesses who were present, though not subscribers, have been called.

Now, as observed by the learned counsel for the defendant, this Court should, and will, as a general rule, always require that the best evidence of which the case in its nature is susceptible should be presented to it, and will never receive that which is merely

substitutionary in its nature as long as the original evidence is attainable, and, in accordance with the principle laid down by the Privy Counsel, in the case of Syud Abbas Ally Khan *versus* Yadeem Ramy Reddy,* and by this Court, in the case of Khoodoo Beebee *versus* Gopal Dass Mohunt, both cases cited by the defendant's counsel, will always require a party, *in whose power a deed has been*, to give satisfactory evidence of the loss or destruction of the original before secondary evidence can be properly admitted. If, however, it be shown that the production of primary evidence is *out of the party's power*, secondary evidence, that is, evidence falling short of the best in degree, is admissible.

In the present case, the deed of permission, on which the plaintiff's suit is based, has never been in the possession or power of the plaintiff, but always in that of Chundrabullee. Notice was given her, through her mookhtear, to produce it, but she failed to do so, alleging that her inability arose in consequence of its being in the toosakhana under joint keys. This, doubtless, was an untruth; but, on the whole facts of the case, as the deed has not been produced, a very strong presumption arises that the original deed of permission was destroyed by Chundrabullee when she was acting in concert with Bhoobunmoyee, the widow of her deceased son, Bhowaneekishore, and when, consequently, she was acting adversely to any party whom she might, under the actual deed of permission given to her by her husband, subsequently adopt. Though, therefore, as to the present claim, she is not acting adversely to the plaintiff, I consider her, in the matter of the production of the deed of permission, in the light of an adversary, withholding it at the time of trial; and, under this view, secondary documentary evidence of its existence and nature is admissible.

Again, it has been urged that, granting that secondary documentary evidence of the existence and nature of the deed be admissible, still the attesting witnesses to it should have been summoned, and, if they have died, proof of their death should have been given, which has not been done; and, in the absence of that proof, no inferior evidence can be looked at. Doubtless, it would have been well had proof of this nature been given. It appears, however, that a petition was filed in the court below, stating, amongst other things, that the witnesses were all dead. The assertion in this petition was never denied by the other side, and, considering that more than thirty years have elapsed since the execution of the deed, in the absence of such denial the fact may be safely assumed, and the evidence of parties other than the attesting witnesses may, if necessary, be looked at.

* Moore's Indian Appeals, Vol. III. pages 156—163.

It has been contended by defendant's counsel, that the present deed of permission is a deed of that nature, and something more ; that it is a testamentary paper in the nature of a will, and it is therefore to be presumed, from its non-production, that it has been destroyed by the party making it, with an intention of revoking it. Now there is no doubt that the deed propounded by plaintiff is of a testamentary nature. Were I, therefore, inclined to apply to it the doctrine of implied revocation, I should be of opinion, seeing that the circumstances under which it was executed had not at the period of the testator's death suffered any alteration, that no implication of that nature arises at all. Moreover, as the presumption arising from the facts of the case seems to me, as before observed, to be, that the non-production of the document is caused by its destruction by another party, Chundrabullee, *after* the death of the testator, I am unable to adopt the presumption to which defendant's counsel would lead the Court.

As then both the documents and the witnesses produced by the plaintiff are admissible as evidence, it is necessary to look at them somewhat more closely. The duplicate copy of the deed is to the following effect—"Before you gave birth to a son I executed a deed of permission to you to adopt. Since then, by God's favor, you have given birth to a son. Nevertheless, reflecting on the future, I have again executed a deed of permission to you to adopt. If the son born of your womb should fail, which God forbid, then, for the performance of my own and your shradh, the worship of the deity, and for succession to my estates, real and personal, you shall adopt a son. If he should die, which God forbid, you, according to the above, shall adopt another son for the preservation of the offerings and the performance of your and my own shradh ; and so on in succession, failing the one on each occasion adopted. For this reason I have executed this deed of permission."

It appears that, two years before the execution of this deed, in 1224 B. E., Bhowaneekishore had been born, and as, before his birth, *viz.* in 1215, Gourkishore had empowered his wife to adopt in case of his dying childless, so, after the birth of a son, fearing lest some accident should occur to him, Gourkishore again, in case of his son dying, empowered her to adopt as often as from death it might be necessary ; and the adopted son was to be the owner of his estates, real and personal. This deed has, looking to its terms, every internal mark of genuineness, and is just such a one as a Hindoo in Gourkishore's position would take care to write. It was executed on the 25th Kartikh 1226, or 9th November 1819, and was registered without any unnecessary delay. The exact copy of the original, bearing the signature of Gourkishore, which is required to be filed at the time of registration by Clause 1, Section II. Regulation XX. of 1812, is before the Court ; and it bears on the back of it

an endorsement, signed by the register of deeds, specifying the date and time of the day in which it was presented for the purpose of being registered. Such an ancient deed, though a duplicate, coming from the custody of the register of deeds, by whom its original was registered shortly after its execution, at a period of more than thirty years previous to the institution of this suit, is evidence of the strongest kind, and, when taken together with the probabilities in favor of the deed of permission arising from the previous circumstances of Gourkishore above detailed, constitutes, to my mind, conclusive proof of the execution, by Gourkishore, of the original, of which this is the exact copy, and this without recourse to evidence of witnesses, either of those who saw Gourkishore execute it or who knew his handwriting; though, doubtless, had only an authenticated copy of the original deed been produced, evidence of this nature, under Clause 5, Section II. Regulation XX. of 1812, would have been requisite. I need, consequently, not remark further on the evidence of the witnesses, nor on the objections which have been offered to them, but will proceed to a consideration of the next point requiring determination.

Having declared the deed propounded by plaintiff to be a genuine deed, the next point is as to its legal significance. It has been contended on the part of the plaintiff by the learned advocate general, that the deed of permission is in the nature of a testamentary instrument, or writing, by which an estate of the nature of a fee simple conditional, that is, upon condition that he had issue, was given to Bhowaneekishore; that, in the event of his having issue, the estate then became absolute; but that, in the event of his having no issue, he was limited to a life interest in the property, and a future estate in the nature of an executory devise is created in favor of a son, to be adopted by Gourkishore's wife, Chundrabullee. On the part of defendant it was contended by Mr. Money, that limited estates in land are unknown to this country, and are inconsistent with its revenue system; that, as no statute *de donis* here exists, or has ever existed, all estates created are in their nature absolute; that, consequently, under the law, Bhowaneekishore's estate was a fee simple absolute; and, on his death, after having succeeded to his father's estate, it descended first to his son, either natural or adopted, and afterwards to his heirs under Hindoo law; that, moreover, the words of the deed are sufficient to pass absolutely the estates, and, under the principle laid down by the House of Lords in the case of *Hoare versus Byng** as to personal property, which is identical with the rule which should be followed as to realty, it is impossible to give to a party a right to a thing out and out, to give an absolute interest in that

* Clarke and Finnally's Reports, Vol. XX. pages 508—533.

thing, and then afterwards to restrict that absolute gift by limitation over ; that, consequently, under the deed of permission, admitting it to be genuine, the plaintiff takes nothing.

The estate to be taken under Gourkishore's deed must be determined with reference to Hindoo law, and not to the general law of this country. It is, consequently, only necessary for me to remark, that there is not the slightest ground for the position taken up by the counsel for the respondent, to the effect that limitations of estates are unknown to, and are illegal according to, the laws of this country. So far from this being the case, there being no statutory enactment forbidding the same, it is competent to any one to limit and restrict future interests in land in any way that whim or ingenuity may suggest, though probably the exact terms used in the very learned work,* to which we have been referred, may not be resorted to ; and under Hindoo law limited or restricted estates are of daily occurrence. It is true that the hypothecation which Government has on every estate as security for its revenue, may have a tendency to check such dispositions, unless they arise by operation of law, as, on the occurrence of an arrear caused by a party with a limited interest, if it be not paid by parties with either a vested or contingent interest in the property, the estate is brought to sale, and by such sale all future interests would be defeated. But the existence of this rule, however it may have a tendency to check the exercise of it, is not inconsistent with the power itself of limiting estates, which undoubtedly exists, both under the general law of the country and under Hindoo law.

Looking, then, on the deed of Gourkishore by the light of Hindoo law, it appears to me that it is a testamentary disposition of his property, by which he devised it absolutely to his son Bhowaneekishore and his heirs general, subject to a power of appointment by the widow, to be exercised in the event of his son Bhowaneekishore dying, without leaving a son, either natural or adopted, or to be adopted, him surviving. This estate in the son was absolute, and permitted alienations, which it could hardly have done were it only a fee simple conditional. Whatever interest, however, the heirs general of Bhowaneekishore may have held under it, was subject to be destroyed, by the exercise, by the widow, of the power of appointment, when the executory devise in favor of the party so appointed would arise and displace it. By this means the direct succession to Gourkishore and the performance of the necessary obsequial rites are effectively attained.

Whatever objection might arise to such a disposition in other parts of India, from the doctrine that the inchoate right of the son

* Fearn on Contingent Remainders.

to property is from his birth, none such can arise in Bengal, where the above doctrine is not recognised ; where, whilst the father lives and is free from defect, the sons have no right at all ; and where, by the power of making testamentary disposition, the father, if so minded, can will away, even to a stranger, the whole of his ancestral property.

It has been objected by the respondent to the exercise of the power of adoption by the widow of Gourkishore, that, as Bhowanekishore had married and had succeeded to the property, his widow had, by virtue of her marriage, a vested right in the property, and that any act done in derogation of that vested right could not be upheld. I find no authority for this doctrine in Hindoo law-books. If the power of appointment can be exercised in derogation of the right of other heirs of the son, it can be exercised in derogation of that of the widow ; and the fact of the son of Bhowanekishore having reached his majority and succeeded to the estate is, in a case like the present, where the object of the testator is to perpetuate direct heirship, of itself deserving, it appears to me, of no lengthened consideration.

Of the soundness of the principle laid down in the case of *Hoare versus Byng*, cited by the counsel of the respondent, and its applicability to this country, as well as to England, when circumstances rightly call for its application, there can be no doubt. As, however, it appears to me that, by the terms of the deed executed by Gourkishore, a power of appointment, in certain circumstances, remains in the widow Chundrabullee, it is not applicable to the present case.

Whether, under the legal significance given by me to the deed propounded by him, plaintiff is entitled to succeed or not, cannot be determined, until the questions, as to the validity of his own adoption and of the permission to adopt given by Bhowanekishore to his widow Bhoobunmoyee, have been considered.

It now becomes necessary, under the third issue laid down by me, to enquire into the circumstances attending the alleged adoption of the plaintiff.

It is alleged by plaintiff, that Gokoolkishore Acharj offered him, as a minor, for adoption by Chundrabullee, on 15th Bysakh 1251, and executed to his wife Hurrosoonderee Debea a deed, permitting her to give her younger son in adoption, first to Chundrabullee, and, if she would not take him, then to any one of the other zemindars who might offer to adopt him, provided she thought it advisable ; and adding that, in the event of the adoption of the minor by Chundrabullee, she, Hurrosoonderee, might, if the concurrence of his elder brother could be obtained, assign to him his father's 5-cowree share of pergunnah Alapsingh as a gift attendant on adoption ; that, in furtherance of the intention evidenced in the

deed of permission, Gokoolkishore and his wife, on 30th Bysakh, the day of his father's death, of their own free will, made him over to Chundrabullee to be adopted, who formally accepted him; that on the day after the death of Gokoolkishore, his natural mother and the said Chundrabullee mutually executed to each other deeds of gift and acceptance, not that such were necessary, but merely with a view of affording a means of confirmation to what had previously been done orally and sufficiently under Hindoo law; and that these deeds were registered, and on 20th Assin 1252 the ceremonies of adoption were performed; that the necessary ceremonies in the family of his adopting father were subsequently performed; and plaintiff received the 5-cowree share of Alapsingh, which had belonged to his father, with the permission of his elder brother.

It is alleged by the defendant, that plaintiff's natural father was anxious to give the plaintiff to Bhoobunmoyee, and Chundrabullee was anxious to adopt the defendant Rajendurkishore; that plaintiff was too old, so Bhoobunmoyee adopted Rajendurkishore; that Chundrabullee then became angry, threatened to act, and did act, upon the old deed of permission of Gourkishore, which had either been revoked or never thought of; and that this action on the part of Chundrabullee, moreover, arose after the death of Gokoolkishore; so a deed of permission was forged at her instigation.

When a deed of permission to adopt has been proved, as in the present case, the subordinate transactions done in performance thereof require but comparatively slight proof, in order to their authentication and to throw on the opposite side the burden of disproving them.

Now, the deed of permission given by Gokoolkishore to his wife, with a view of enabling Chundrabullee, if so minded, to act upon the power of appointment given to her by her husband Gourkishore, is attested by the writer of it, Indranarain Ghose, and other witnesses; and I see no reason for doubting the evidence given by them as to its execution. It may be that Chundrabullee's anger, as stated by the counsel for the defendant, caused the adoption of the plaintiff by her; but be that as it may, there is nothing in any of the objections offered by the defendant sufficient to displace the evidence of the writer of the deed. Then again, it is satisfactorily in evidence, that the actual giving and taking took place on 30th Bysakh, previously to the death of the father, and the deeds confirmatory of the adoption of 31st Bysakh 1238, though executed subsequent to Gokoolkishore's death, themselves allude to the previous giving and taking. These deeds were registered, and they have been proved by the parties who, if not attesting witnesses, were respectable persons present at their execution.

In order to displace this evidence, objections have been offered, pointing out the anomalous nature of the deed of permission itself given by Gokoolkishore to his wife Hurrosoonderee, and the suspi-

cion attaching to the different deeds from the dates on which the stamp papers were severally purchased and from the parties purchasing them. On the subject of these objections, it is unnecessary that I should enter further than to say that they do not appear to me in any way to invalidate the evidence adduced by the plaintiff.

Such being the facts found by me on this issue, it now becomes necessary to apply the points of law raised so far as they arise out of the facts as found.

There seems to me to be no question that the permission to adopt and the giving and receiving in adoption need not be evidenced by a formal writing. The evidence of witnesses either to the one act or the other is quite sufficient. Such being the case, and the evidence of witnesses as to the giving and receiving of the plaintiff in the present case, *during his father's life-time*, being trustworthy, no question as to the purity or impurity of the parties concerned at that time arises. It is, therefore, unnecessary to give an opinion on the contention on this point raised by the parties before the Court. Whether, on the one hand, the act of adoption has a civil and a religious element, distinct and separate from one another, so that the civil portion of it might be performed by persons, according to Hindoo law, when impure, whilst the religious must be postponed until they have regained their purity, or whether, on the other, that act is so essentially of a religious character that the mere giving or taking must be made by parties capable of performing all other religious ceremonies, are points which can be fully discussed when they legitimately arise. It is only necessary to remark, as bearing upon the present case, that it appears that, if the operative part of the ceremony of adoption, *viz.* the giving and receiving, has been properly performed before kinsmen,* the omission even of the oblation to fire in the case of a brahmin does not invalidate the adoption, that oblation being an unessential part of the ceremony, and the absence of an unessential part not invalidating that which is otherwise valid.

Looking, then, to the mode in which the adoption of the plaintiff took place, there can be no doubt that the adoption is a valid one. Another objection, however, has been raised to the plaintiff's adoption, founded upon his age. That age is said to have been four and a half years by the one side, and twelve years by the other. It seems to me that the evidence established that plaintiff was nearer the latter than the former age, and, consequently, that he must have undergone the ceremony of tonsure previously to his adoption by Chundrabullee. As, however, it is not contended that the plaintiff

* Colebrooke's Digest, Vol. III. page 242.

was invested with the thread previous to his adoption, the adoption in the present case is not invalidated.

The rule prescribing that adoption should take place before the boy is five years old, has been held by the Court, following the best authorities, to be simply directory and not imperative; and the only absolute prohibition as to age seems to be that, amongst brahmins, adoption cannot take place after the boy has been invested with the thread, which, in Bengal, is limited to the sixteenth year, or amongst Shudras, after his marriage. Within that limit adoption may take place, subject to different rules—as to the performance of the ceremonies of inauguration, of which the principal is tonsure—to be applied on consideration, whether the boy to be adopted be a stranger or related to the adopting father. In the present case the plaintiff was the nephew of his adopting father; and it has been held in a Madras case* that an adoption is good, though the adopted boy should have passed his fifth year and have undergone the ceremony of purification by tonsure, provided he be a sagotra, or descended in a direct male line from a common male ancestor, or that he be the son of a near relation on the paternal side of the adopter, and this doctrine seems to be assented to in a note by Mr. Colebrooke, appended to the case of *Kerutnarain versus Mussummut Bhoobunesree*.† After remarking on the supposed limitation of five years, Mr. Colebrooke observes: "In other provinces, and even in Bengal, if the adoption be of a near relation on the paternal side, no difficulty would occur, as the adoption of a brother's son or other nearest male relation of the husband would be unquestionably valid at an age much exceeding that specified; but in Bengal, where the adoption of *strangers* to the family is practised, the settled doctrine is, that the boy's age must be such that his initiation, the principal ceremony of which is tonsure, may yet be performed in the adopter's name and family."

Under this view there seems to me to be no doubt but that the plaintiff in this case, a nephew, was altogether eligible for adoption by the uncle, his adopting father. Whether, under any or what circumstances, a *stranger* can be adopted after the ceremony of tonsure has been performed in his natural father's family, and whether that ceremony can and should be repeated, and, if it can, what is the effect of its repetition, are questions regarding which conflicting opinions may be gathered from the Hindoo law text-books. As, however, they are not necessarily involved in the present case, it is needless to pursue them further.

I now turn to the defendant's case, and to the enquiry into the deed of permission alleged to have been executed by Bhowanee-

* Morley's Digest, Vol. I. page 22.

† Select Reports of the Sudder Dewanny Adawlut, Vol. I. page 161.

kishore Acharj in favor of his widow, Bhoobunmoyee Debea, under which permission defendant has been adopted and has taken possession of Gourkishore's estates, real and personal.

This deed of permission, which is also a testamentary instrument, directs his widow, as his health has been much impaired, and as he has no male issue, on his death to adopt a son from a kindred family, and, if that is not possible, from a strange one, and to repeat the act as often as, from death, it may become necessary. It then recites that, being much satisfied with his wife, he makes over to her certain properties for her own immediate enjoyment. Certain of these properties, she is, on the son to be adopted reaching his majority, to transfer to him ; of the residue of those mentioned, she is to remain in possession, during her life-time, in lieu of maintenance, and, on her death, the adopted son, or his heir, is to take possession of the same. Of the remaining properties alluded to, exclusive of those above, during the minority of the son to be adopted, his wife is to remain in possession of a one-half share, and his mother, Chundrabullee, of the other half, until the minor reaches his majority. The shikmee talooks also of pergunnah Alapsingh, held by Chundrabullee, and recorded in the perishtah of the zemindaree, at a jumma of rs. 2708-4-7, are to remain in her possession ; the two ladies in concert are to manage the estates and to pay the revenue of the same, and perform all the necessary religious ceremonies, the expense of which is to be borne by each in equal shares ; in all suits instituted against him, his wife and mother are to appear and represent him ; his sisters Juggadumba Debea and Aunundmoyee Debea are to receive from the profits of the above estate the sum of rs. 1212 yearly, each, payable by his wife and mother in equal shares, until the minor reaches his majority, when he will pay the same ; the chakeran lands are to remain in their possession, one-half in the possession of one, and the other half of the other ; the house and building are to remain in possession of both ; on the son to be adopted reaching his majority, all the property, real and personal, shall, without objection on the part of the wife or mother, pass to him, and his name shall be registered in the collectorate ; that loans contracted by Bhowanee-kishore or his mother shall be liquidated by his wife and mother in equal shares ; and if, on account of previous debts of his mother, the talooks should be put up to sale, the widow is to pay one-half of the same ; of all sums in deposit in court, the widow and the mother are each to receive one-half ; if his mother should die before the minor son reaches his majority, all the property held by her is to pass to his widow ; all the expenses attendant on the management of the estates, until the son to be adopted reaches his majority, are to be borne in equal shares by his widow and his mother ; and on the adopted son's reaching his majority and obtaining possession

of all his estates, real and personal, he shall pay to his mother, if she survives, during her life, the sum of rs. 3000 annually out of the profits of the zemindaree.

This instrument was executed by Bhowaneekishore on 12th Bhadro 1247 B. E., two days before his death, which, there is no doubt, occurred on the 14th of the same month, corresponding with the 28th August 1840. The deed is not registered, and the non-registration is not satisfactorily accounted for. Bhowaneekishore's place of residence, Mooktagatcha, was only 14 or 15 miles distant from Nusseerabad, and two days was ample time within which to procure its registration.

In the present case it is not sufficient for the plaintiff to prove the validity of his own adoption. He must, to enable him to succeed, show a strong *prima facie* ground for the belief that the deed of permission, under which the adoption set up by the defendant has taken place, is a forgery, and not what it is represented to be. This he has done by directing the Court's attention

1st. To the evidence of fraud and collusion between the widow of Bhowaneekishore and Chundrabullee, afforded by the terms of the deed of permission.

2nd. To the distinct evidence produced by himself, in opposition to that brought forward by the defendant, showing that Bhowaneekishore returned from hunting very ill, that he never recovered or rallied, and died without having executed any deed of permission.

3rd. To the suspicion of forgery which the stamp returns of the collectorate cast upon the deed now propounded by defendant.

4th. To the probabilities of the case, which are all against the execution, by Bhowaneekishore, of such a deed as that now propounded by the defendant.

That evidence has been rebutted by the other side ; and previous to expressing an opinion on it, I would observe that the deed propounded by the defendant, whether a genuine deed or not, was produced shortly after Bhowaneekishore's death, and acted upon for some years by both his widow and Chundrabullee. To the benefit of whatever argument in favor of the deed such action may bring, the defendant is clearly entitled ; but the issue in the present case is not met by reference to this action. Plaintiff admits it, declares that it was the result of collusion, and denies the execution of the deed itself. It seems clear, then, that it is to this last point that attention should be turned, and that the mass of evidence which has been presented to the Court, with a view of showing the acts done under, and the early recognition obtained by the deed, from all quarters, may be put aside as of little or no value, except as corroboratory of the evidence, intrinsic and extrinsic, of the actual execution of the deed by Bhowaneekishore.

Acting upon this view, and looking first to the extrinsic evidence produced by both parties on this point, I have not the slightest hesitation in coming to the conclusion that the deed is a forgery. That a person in the position of life of Bhowaneekishore, and a brahmin, should have executed a deed of this nature, unattested by any member of his family, and surrounded only by Debs and Pals, is *a priori* improbable; and, on looking to the evidence of these parties, the statements made by them increase the improbability. Their representation, amidst a mass of improbable and inconsistent statements, is, that Bhowaneekishore returned ill from elephant hunting, and, whilst convalescent, executed this deed; that he had, shortly after, a return of fever, brought on by surfeit or other cause, which eventually carried him off. This statement is not, however, supported by the testimony of the most respectable witnesses, who, at great length, and with great minuteness, detail what occurred from the time Bhowaneekishore returned from hunting up to his death. From this testimony, on which I entirely rely, it would appear that Bhowaneekishore returned from elephant hunting at Sonakhali ill; that he quickly grew worse, and never rallied, and was, for four days before his death, in a state of insensibility, so as to be unable to transact business, had it been proposed to him so to do, which does not, however, seem to have been the case. Dr. Llewellyn, the civil surgeon of Mymensingh, was in attendance on him, and only left him when all hope of recovery had gone, and it was necessary to remove him to that part of the house to which, in the eastern districts at a distance from the Ganges, parties are always removed when at the point of death. Had the deed propounded been a genuine one, it is more than probable that the medical officer would have been made a witness to it. By such a course all cause of cavil would be removed, for the signature of one respectable European would have attested its genuineness. By the absence, therefore, of his signature, an additional reason is afforded for doubting the alleged deed of Bhowaneekishore.

Looking, again, to the intrinsic evidence afforded by the terms of the deed itself, it seems to me to lead irresistibly to the conclusion that it has been fabricated by Bhoobunmoyee and Chundrabullee, for their joint benefit. Bhoobunmoyee, knowing the existence of the deed of permission given by Gourkishore to Chundrabullee, and unarmed with any permission from her own husband, was willing to arrange with Chundrabullee; and Chundrabullee again, looking to her own present advantage, and forgetful of the duty which she owed to her deceased husband, and urged probably to it by dependants around her, was equally willing to arrange matters with Bhoobunmoyee. The result of the arrangement was the deed in question, by which an heir to Gourkishore and Bhowaneekishore, who could perform all the necessary exequial rites, was secured, and

the two widows were, to the detriment of the son to be adopted, until the boy to be adopted reached majority, to enjoy the profits of certain estates, and to represent Bhowaneekishore in all suits and matters pending. The arrangement is one admirably well calculated to meet the requirements of Bhoobunmoyee and Chundrabullee, but it is not one which would suggest itself to a very young man of twenty-three years of age, well pleased with his own wife, as he represents himself to be, and one anxious solely for the adoption of an heir. It is, in short, a deed bearing all the marks of great care and mature deliberation in its preparation, and is not the production, represented by defendant's witnesses, of an interval between severe sickness and a relapse which ended fatally.

Such, then, being my opinion of defendant's case, looking to the deed itself propounded by him, and the evidence of the witnesses regarding it, it becomes unnecessary for me to enter at length into any argument drawn from a comparison of the several dates on which the deed was executed, and that on which certain stamp papers of the same value with that on which the deed was engrossed were sold from the collectorate, from which office the paper of Bhowaneekishore's deed was confessedly purchased. The date of the deed is the 26th August, that is, two days before Bhowaneekishore's death, and in that month no papers of seventy rupees were sold in the collectorate; and the date on which two papers of the value of rupees seventy were sold is the 12th September. The fact is suspicious, but not conclusive as to the identity of one of the papers sold in September with the one on which the deed was engrossed. Altogether, I prefer to rest the case entirely upon the evidence adduced and the probabilities arising out of the case as laid before us.

As, then, for the reasons above given, it appears to me that the deed of permission set up by defendant is not a genuine document, it becomes unnecessary to enquire whether the adoption made under it was a valid and legal one or not. The original permission falling, everything done under and in pursuance of its terms necessarily falls also, and the fifth and sixth issues above laid down by me do not call for a determination on them.

Bhowaneekishore Acharj having died without a son, either of his body or adopted, or to be adopted, it follows that, under the interpretation put by me above upon the deed of testamentary disposition executed by Gourkishore, the son formally adopted by his (Gourkishore's) widow, under the power given to her in that disposition rightly exercised, by virtue of the executory interest in his favor created under that instrument, succeeds to the whole estate, real and personal, of Gourkishore Acharj. I would, therefore, reverse the decision of the court below, and decree to plaintiff his claim, with mesne profits, to be ascertained in execution, from the date of suit, and interest upon the amount so ascertained from the commence-

ment of the year following that on which the wasilat accrues, up to the date of realisation. The costs of both courts to be borne by the defendants, respondents.

Mr. B. J. Colvin.—In my original judgment in this case I held that Gourkishore did not, by his deeds of permission to his wife Chundrabullee to adopt, intend to restrain in any way his son Bhowanee's rights in the case of his having a son, either by procreation or adoption. I was also of opinion that Bhowanee, having succeeded to possession of his father's estate, the deed of permission by the latter became for ever inoperative, so that Chundrabullee could not, in virtue of it, afterwards adopt a son. But this review has been admitted to try whether the deed might not still be in force, in the event of Bhowanee's leaving no son by procreation or adoption, and with this object to try whether Rajendur, the alleged adopted son of Bhowanee, had been adopted or not; but even failing proof of Rajendur's adoption, it is necessary not only that Ramkishore should prove the fact of his own adoption, but that he should show that, by the Hindoo law, it is valid, notwithstanding that Bhowanee did survive his father and succeed to his estate. I have no doubt that Gourkishore did execute the deeds of 1215 and 1226 B. S. This is proved to my mind by the latter having been duly registered, and I do not think, as has been argued by the learned counsel for Rajendur, in order to explain the absence of the original document of 1226, that Gourkishore revoked the deed. I consider that Bhowanee having been only four years old when his father Gourkishore died, forbids the supposition of revocation of the instrument, for at that tender age there was as much occasion for providing that a son should, in case of need, be adopted, as there was when the deed was executed at the time of the boy being only two years of age. But it is not satisfactorily established to my mind what has become of the deed of 1226. It is said to be in the toshakhanah which was common to Chundrabullee and to Bhoobunmoyee; but in this case there should be, as is usual under such circumstances, a list signed by both parties of the contents of the toshakhanah; and in the absence of this list, the fact of the deed being in the toshakhanah cannot be admitted. Considering, however, that Bhowanee lived till he was about twenty-three years of age, or nearly nineteen years after his father's death, and the adoption by Chundrabullee did not take place till five years later, *i. e.*, in 1252, it is not surprising that the deed should have been lost or mislaid, as, from Bhowanee's living so long as he did, the necessity of putting the deed in force might be thought by the parties to have passed away. I do not therefore think the absence of the original deed of 1226 fatal to appellant's case, for he, at least, could have had no control over it, and I think that the acts of others in

not producing the deed should not be allowed to prejudice him ; but that it is open to him to prove, irrespective of the original deed, the permission, by Gourkishore to Chundrabullee, to adopt, and the fact of his adoption in conformity therewith. I have already said that I did not doubt that Gourkishore did give the permission to Chundrabullee to adopt ; and if no more were involved in the present argument than of the two parties whose adoption was the most trustworthy, I should have little hesitation in preferring that of the plaintiff, appellant, as I think it best supported by the evidence. I need not detail my reasons at length for this opinion ; it will be enough that I express my concurrence in the observations upon this head to be found in the judgment of my colleague, Mr. Sconce. But although this is my opinion, I nevertheless retain my original view of plaintiff's claim, that, founded as it is upon the plea of adoption by Chundrabullee's carrying out the intention of Gourkishore, it is inadmissible ; for I cannot allow that she had any legal right to exercise the authority given to her to adopt, as such authority must be held to have lapsed on Bhowanee's attaining majority and possession of his property. As I before remarked in my judgment when the case was first heard, there is nothing in the deed of 1226 indicating a purpose on Gourkishore's part to extend to his widow the power of adoption to an indefinite period, even should their son Bhowanee survive his father : rather it was only granted to be available in the event of his death during his father's life-time leaving them, as they were before his birth, without a son. In my opinion, therefore, Chundrabullee was not warranted, with reference to her husband's directions, in adopting the plaintiff when she did ; and he cannot, consequently, in reliance upon such adoption, come into court to question the alleged adoption of defendant, respondent. Moreover, I do not understand by what authority of Hindoo law Chundrabullee thought herself entitled to make an adoption which should curtail Bhoobunmoyee's enjoyment of the estate in succession to her husband Bhowanee. She had entered upon possession of it for her life-time in accordance with Hindoo law, and was left without assertion of any rival claim for nearly five years. It seems to me that Chundrabullee could not then perform an act of adoption to the injury of Bhoobunmoyee's existing rights. Were it to be considered that she could, it might as well be said that he could have made the adoption in supersession of the rights of any other heir to Bhowanee's estate, even supposing such heir to be a son adopted or begotten.

I think too that, from the absence of the original deed of permission, it may be deduced that Chundrabullee was aware that her own power under it had ceased when Bhowanee survived and succeeded to the estate of his father. Be this as it may, I consider that

she had no authority under the deed to adopt the plaintiff when she did, whose appeal I would therefore dismiss, in affirmation of the former judgment of this Court of 30th January 1858.

THE 7TH MARCH 1859.

H. T. RAIKES and J. H. PATTON, ESQS., Judges, and G. LOCH, ESQ.,
Officiating Judge.

Case No. 127 of 1858.

*Regular Appeal from the decision of Mr. E. Latour, Judge of
the 24-Pergunnahs, dated 11th January 1858.*

Mrs. Charlotte Dacosta and others, (Defendants,) *Appellants,*
versus

Mirza Mahomed Alee, (Plaintiff,) and others, (Defendants,)
Respondents.

*Mr. R. T. Allan, Baboos Ramapersad Roy, Shumbhoonath
Pundit, Jugudanund Mookerjee, Kishenkiskore Ghose, Bung-
sheebuddun Mitter, and Gobindchunder Mookerjee, and Moon-
shee Ameer Alee, for Appellants.*

Moulvee Murhumut Hossein, for Respondents.

Suit laid at Company's Rupees 13,764.

It appears from the plaintiff's statement that Zakya Khanum was the sole owner of a house, the subject of the present suit, situated in Entally, which she let on the 27th November 1844, for one year, to Nyss, one of the defendants. Nyss continued in occupancy after the expiry of the year. On the 14th November 1845, Zakya Khanum executed a will in favor of her daughter, Peary Khanum, by which she made over the house to her, and died on the 22nd January 1846. Peary Khanum demanded rent from the tenant, but, before she could take any legal steps to enforce payment, the defendant, Fatima Khanum, with the assistance of her son, George Meyer, junior, endeavored to enforce certain rights she claimed over the property as mortgagee. Meyer distrained the property of Nyss for rent under Regulation V. of 1812. Nyss contested the demand in a suit before the collector, and Peary Khanum filed a petition as owner of the house, and appeared as third party. In that case Nyss admitted the rights of Peary Khanum, and, as the distrainer could offer no proof giving him a right to distrain, the property of Nyss was released. Subsequently Peary Khanum brought two summary suits for rent against Nyss, one, No 55, for the period extending from December 1845 to June 1846, and the other, No. 85, for the period from July to November 1846. She obtained a decree in the first and lost the second suit. Two suits

Where a plaintiff sued to recover rent, and defendant pleaded possession of the premises, the proprietor, was held to the rights of respective parties must, under the circumstances, be determined before claim for rent could be inquired into.

were then instituted in the civil court to reverse the decisions of the collector, one by Nyss to set aside the award for rent in favor of Peary Khanum, the other by Peary Khanum for the rent for the latter part of 1846, her claim to which had been rejected by the collector; and in both Peary Khanum succeeded, for it was held that, as Nyss, in his contest with G. Meyer, junior, had acknowledged his liability to Peary Khanum, any subsequent arrangement he might have entered into with Meyer could not bar her right to recover rent from him. These decisions were passed on the 15th March 1847. It appears further that, on the 1st May 1847, Peary Khanum served a notice under Section IX. Regulation V. of 1812, upon Nyss and the other defendants whom Nyss had admitted into the house, requiring them to pay an enhanced rent of rs. 80 from a certain date or to quit the premises. Peary Khanum married plaintiff, and, on the 7th August 1847, executed a will in favor of her daughter Miriam, with reversion to her husband, the plaintiff. By this will the house in dispute and other property were bequeathed to her daughter, and, on the 15th of August 1847, Peary Khanum died. An action to recover the rent from 1847 to 1850 was brought by plaintiff against all the defendants, but the case was nonsuited; and he now, as proprietor, Miriam his step-daughter having died, brings the present action to recover the rents from 1847 to 1855.

The defendant Nyss has not appeared. He is reported to have died some years ago, and his heirs have entered no answer.

By the other defendants, Mr. Meyer and Mrs. Dacosta, the plaintiff's right to recover rent is disputed on various grounds. It is urged by them that Peary Khanum was not the daughter of Zakya Khanum, nor was Peary married to the plaintiff; that the premises in litigation were the property of Zakya Khanum, cousin of Fatima Khanum, who lived with George Meyer, senior, the father of George Meyer, junior, and of the defendants, Waud A. Meyer, Miss Meyer, and Mrs. Dacosta; that in 1824, Zakya Khanum mortgaged the property for rs. 3000 to George Meyer, senior, who died, leaving Fatima Khanum executrix to his will, and she duly took out probate and administered to it; that on demanding repayment of the loan, with interest, from Zakya, she, being then unable to pay, executed an ikrar on the 7th September 1844, binding herself to pay the amount within a certain period. Being unable to fulfil the terms of this agreement, she, on the 7th January 1845, sold her equity of redemption to G. Meyer, junior, for a nominal sum, with the understanding that she was to retain possession for life, and that on her death the property should be considered to belong to the estate of George Meyer, senior. That Zakya Khanum died in 1846, and her funeral rites were performed by Fatima Khanum, who, as

executrix to G. Meyer, senior, and mortgagee, entered upon possession of the property, but being pressed by the legatees under the will of G. Meyer, senior, for the payment of their legacies, she caused the property to be sold at public auction by Messrs. Mackenzie, Lyall and Co., and it was purchased by the defendant, Mrs. Dacosta, for rs. 3000, on the 26th August 1850, subsequent to the death of her husband Dacosta, which occurred in the previous January, and a regular bill of sale, dated the 2nd June 1851, was executed by Fatima Khanum, who also delivered over the title deeds and gave possession to Mrs. Dacosta. It is further urged by the defendant Dacosta, that a notice under Section IX. Regulation V. of 1812 could not have been served upon her in May 1847, for she did not occupy the premises till after her purchase in 1850, and was at the time of the alleged service of notice living with her husband in Calcutta, as shown by the receipts for rent paid to the owners of the houses they occupied in 1847, 1848, and 1849.

The judge has not thought it advisable to enter into the question of the rights of the parties, but considers the plaintiff, as husband and heir of Peary Khanum, and being in possession, as shown by the collector's amulnamah of the 23rd August 1857, and paying the Government land rent, to be entitled to recover the rent of the premises at the rate mentioned in the notice from the parties in possession. He releases the heirs of Nyss, as the claim against them is vague, and the period of their occupancy uncertain; and he decrees the claim from May 1847 to the 2nd June 1851 against Fatima Khanum and her heirs and representatives, including Mrs. Dacosta among the number, and from that date against Mrs. Dacosta alone. From this decision an appeal has been preferred by the defendants Dacosta and the Meyers; and the points we are called upon to determine first of all is, whether, under the circumstances, a suit for rent against the defendants in possession will lie or not, and whether, till the rights of the parties respectively are determined, the plaintiff can or cannot demand rent for the premises from the defendants. In answer to the plaintiff's claim for rent, the defendant Dacosta pleads adverse possession as proprietor of the property for which rent is demanded from her. The defendants also plead a mortgage from Zakya Khanum, from whom plaintiff also derives his title, and they state that she also sold to G. Meyer, junior, brother of defendant, her equity of redemption, as she was unable to redeem the mortgage, Fatima Khanum, the executrix of G. Meyer, senior, and mortgagee, being a consenting party. Should such be the case, Peary Khanum, even if she be the daughter of Zakya Khanum, could not succeed to the property either as heir or by virtue of the alleged will executed in her favor, nor could she convey any title either to her daughter or to the plaintiff, her alleged husband; for, if the property had been mortgaged to the defendant

by Zakya Khanum, and she also alienated in their favor her equity of redemption, she had no further interest in the property.

As an adverse proprietary title is pleaded in the present case by defendants in possession, supported by strong documentary evidence, we think an enquiry into and determination of the question of title is necessary before the claim for rent can be entertained; and we think the judge should have enquired into and disposed of this point, which was in issue between the parties, first of all. Proceeding, therefore, in this manner, we shall first enquire into the title of the litigants, and then determine whether the plaintiffs have a right to rent as claimed. We do not think that such a course will take either party by surprise, for the whole argument before us has turned upon the rights of the parties, and evidence in support of their respective rights has been adduced. The plaintiff derives his title, through Peary Khanum, from Zakya Khanum. It is alleged that Peary Khanum was the daughter of Zakya Khanum, and that the latter executed a will in favor of the former, assigning this property in litigation to her. The relationship of Peary Khanum to Zakya is denied by the defendants. In proof of Peary Khanum's being the daughter of Zakya, we are referred to the answer of Nyss in the contest he had with G. Meyer, junior, when the latter distrained his property. In the proceedings held in that case, Nyss admits his responsibility to Peary Khanum, whom he styles the heir and daughter of Zakya Khanum. We are also referred to the will of Zakya Khanum, in which Peary is mentioned as her daughter and heir, and certain witnesses are called to prove the fact. As regards the statements of Nyss, we have no means of ascertaining what were his means of knowledge; and his admission, which might, to a certain extent, be binding on himself, can have no effect as regards the other defendants in this case. As regards the will of Zakya Khanum, we are called upon to admit as evidence of the relationship between her and Peary, a document which itself requires to be proved. This document appears to have been filed in the suit for rent instituted by Peary Khanum, and decided on the 15th March 1847, but it was not then proved; and in the present case certain witnesses depose to the execution of a will by Zakya Khanum, but they have not proved that which has been filed. On the other hand, amidst a quantity of oral testimony adduced by the defendants, we have the deposition of Mr. Colebrooke, formerly a pleader in this Court, under whose protection Peary Khanum was living for several years. He appears to have been intimately acquainted with both Zakya Khanum and Fatima Khanum, and states that Peary was a servant in Zakya's establishment, and that he took her from her family. Now Colebrooke, from his uncle's connection with Zakya Khanum, had full opportunity of knowing whether any relationship existed between her and

Peary ; and though it be true that he subsequently separated from Peary, we do not, on that account, consider his evidence unworthy of credit. It is urged by the counsel for the plaintiff, respondent, that, supposing the Court are disposed to consider the evidence of Colebrooke as carrying great weight with it, and are led therefrom to conclude that Peary Khanum was not the daughter of Zakya, yet that does not prevent her inheriting under the will. It certainly would be no bar to her inheriting under the will, had that will been proved, and Zakya Khanum had died possessed of the property in dispute ; but if either before or after executing the will she alienated her right in the property, the will is inoperative. But we hold that the will has not been satisfactorily proved.

We find then that the evidence adduced by plaintiff in support of Peary's relationship to Zakya is not satisfactory, and this defect affects plaintiff's title as derived through Peary Khanum, under color of her relationship to Zakya ; but we also find that at one time Peary Khanum did, through the intervention of the courts, exercise certain rights as proprietress, and received rents from Nyss, the former tenant. We also find that the plaintiff has received an amulnamah from the collector as proprietor of the land, and the possession of the decrees in favor of Peary Khanum and of the amulnamah makes out a *prima facie* case in favor of plaintiff's right to demand rent, sufficient to require us to call upon the defendants to show their title.

It is asserted by the defendants, appellants, that Zakya Khanum mortgaged the property to their father G. Meyer, senior, in 1824, and that, being unable to redeem, she sold her equity of redemption to them in the name of G. Meyer, junior, on the 7th January 1845. Now, though the original deed of mortgage has not been filed, yet the deed disposing of the equity of redemption, drawn up by an attorney in the English form, has been produced ; and it recites what had previously occurred, making mention of the mortgage. This deed has been fully attested by one of the subscribing witnesses, Mr. Goddard, who deposed to the execution of the deed in his presence by the parties concerned, and we have no doubt as to its being a genuine and valid document. Further, it is not denied that the whole of the original title deeds relative to this property are in the possession of the defendants, and were made over by Fatima Khanum to Mrs. Dacosta, when the latter purchased the property ; and this fact is strong corroboration of the truth of the defendants' statement, that the property was mortgaged to them, for no attempt has been made by plaintiff to show that these title deeds were surreptitiously obtained by the defendants. Zakya Khanum died in January 1846, and Fatima Khanum, executrix of G. Meyer, senior, either with the consent of Nyss, the former tenant, or by some other means, took possession of the premises, and appears

to have held possession since 1847. In order to meet the claims of the legatees under her husband's will, she caused the property in dispute to be put up by Messrs. Mackenzie, Lyall and Co. to public auction, when it was purchased by Mrs. Dacosta, on the 26th August 1850, and the bill of sale, dated the 2nd June 1851, and the title deeds, were made over to her by Fatima Khanum on payment of the purchase money in full ; and in the bill of sale Fatima describes herself as heir of Zakya and mortgagee, and recites the reasons which led her to sell the property. We have observed above, that we consider the conveyance of the equity of redemption, dated the 7th January 1845, a valid document ; and though the original mortgage deed has not been filed, yet we think there is sufficient proof of its existence, and of the *bond fide* nature of the transactions between Zakya Khanum and the defendants, as above narrated, in the instrument referred to. Such being the case, we find that Zakya Khanum had disposed of her entire rights in the property previous to the date of the will, alleged to have been executed by her in favor of Peary Khanum, on the 14th November 1845 ; and, consequently, neither under the will, supposing it to have been proved, nor as daughter of Zakya Khanum, had we thought the evidence on this point worthy of credit, could Peary have succeeded to this property. We consider the defendants to be holding possession under a good and valid proprietary title adverse to the plaintiff ; and we think further, that neither the admission of Nyes of his liability to Peary Khanum, nor the summary decisions for the rent of 1846 and subsequent regular decisions for the same rent obtained by her, nor the fact of the collector's amulnamah being given to the plaintiff, can affect the rights of the defendants, or entitle plaintiff to demand rent from them. Under these circumstances we decree the appeal, and reverse the decision of the lower court, with costs.

THE 7TH MARCH 1859.

H. T. RAIKES and J. H. PATTON, Esqs., Judges, and G. LOCH, Esq.,
Officiating Judge.

Case No. 524 of 1858.

*Regular Appeal from the decision of Baboo Gobindchunder
Bidyaruttun, Principal Sudder Ameen of West Burdwan,
dated 6th July 1858.*

Srinath Hazra, (Defendant,) *Appellant,*
versus

Ramdhun Hazra, (Plaintiff,) *Respondent.*

Mr. R. T. Allan and Baboo Kishenkishore Ghose, for Appellant.
Baboos Ramapersud Roy, Shumbhoonath Pundit, and Juguda-
nund Mookerjee, for Respondent.

Suit laid at Company's Rupees 6000.

THE plaintiff avers that, on the 15th May 1851, he purchased the putnee belonging to the defendant, at a sale for arrears held under Regulation VIII. of 1819, and obtained possession, which he retained till 1857, when, owing to disputes with the former putneedars, a case under Act IV. of 1840 was instituted, and plaintiff was ejected by the decision passed under that Act on the 30th March 1857, which order was confirmed by the session judge on the 18th May following. On the 19th November 1857, plaintiff instituted the present suit to recover possession.

The defendant avers that he has never been out of possession; that, on the occasion of the estate being put up for sale in 1851, defendant, being unable to pay in the arrear, purchased it in the name of the plaintiff, who is a near relative, and completed the sale; that plaintiff never had possession, and, consequently, was never ejected; and not having purchased the putnee, he has no right thereto.

The principal sudder ameen has given a decree for plaintiff, considering the rule laid down in Section IX. Regulation VIII. of 1819, and the decisions of this Court of the 3rd and 31st July 1847, applicable to the case.

It is urged by the defendant in appeal, that neither the law quoted by the principal sudder ameen nor the precedents are applicable to the present case. The law quoted prohibits a defaulter bidding at the sale for his putnee, but it nowhere declares that a benamee purchase is invalid. The cases of July 1847 were the converse of the present, and therefore they are not applicable. In those cases the party who had the legal title was also in possession, and the plaintiffs sued to oust them, on the grounds that they had purchased for the plaintiffs benamee, but the Court refused to assist the plaintiffs in

ousting the alleged benameedars. In the present case, however, the former putneedar is in possession, and the ostensible auction purchaser, who holds the legal title, seeks to eject him, though he has not paid a single pice for the putnee he claims. The principal sudder ameen, without calling for evidence, has rested his decision on the defendant's averment, that he purchased the putnee benamee in plaintiff's name; and, because defendant did so, he considers defendant no longer entitled to retain possession, and would give possession to plaintiff, though not the purchaser, because his name has been made use of. If part of the defendant's averment be accepted by the plaintiff, that the purchase was benamee, the whole should have been received, and the plaintiff called upon to prove his purchase; and if plaintiff has been a party with defendant in contravening the law, the Court will surely not allow him to take advantage of the wrong he has done, and, because the legal title only is in him, eject the defendant. Such a course would be contrary to the ruling of the Court in the case of Kissenchunder Mitter reported at page 422 of the Reports of July 1851, and also to the decision passed in the case of Wuzeeonissa and others on the 16th April 1855, and reported at page 145 of the Decisions of that year. The plaintiff himself avers that he purchased the putnee *bona fide* and paid for it, and offers proof of his averments, and the principal sudder ameen should have called upon him to prove his case.

The decision of this Court, dated the 26th June 1856, reported at page 542, is quoted by the respondent as similar to the present, and it is urged that the rule laid down in that case was applicable to the present.

As the plaintiff has the legal title, the presumption is that he is what he professes to be, the real purchaser, and has paid the purchase money. This presumption might, in ordinary cases of sale, be rebutted by the defendant, who would be at liberty to show that the plaintiff's title was only nominal, that plaintiff's name had, either with or without consent, been made use of by him, and that he, and not the plaintiff, paid the purchase money. But where a defendant knowingly acts contrary to law, he cannot plead such breach of law in bar of the plaintiff's title. His plea amounts to no plea at all. It might have been more satisfactory to the plaintiff, had he been allowed to prove, as he offered, the *bona fides* of his purchase and the validity of his title; but we think it unnecessary to remand the case for this purpose, for, under the circumstances, the possession of defendant can be looked upon only as wrongful, and no other decision than that already arrived at by the lower court could be passed in the present case. We, therefore, dismiss the appeal, with costs.

THE 7TH MARCH 1859.

H. T. RAIKES and J. H. PATTON, Esqs., Judges, and G. LOCH, Esq.,
Officiating Judge.

Case No. 539 of 1858.

*Special Appeal from the decision of Mr. R. N. Farquharson,
Judge of Tirhoot, dated 29th December 1857, affirming a
decree of Syud Ameer Alee, Moonsiff of Jallah, dated 10th
April 1857.*

Gooman Raot and others, (Defendants,) *Appellants,*
versus

Bydnath Jha, (Plaintiff,) and Sheosuhye Singh, (Defendant,)
Respondents.

Baboo Unnodapersad Banerjee, for Appellants.

Baboo Kishensukha Mookerjee, for (Plaintiff,) Respondent.

THIS case was admitted to special appeal on the 26th August 1858, under the following certificate recorded by Messrs. C. B. Trevor and H. V. Bayley. Remanded
according to a
former precedent

“The moonsiff decided a case against defendant, petitioner, on the 14th April 1857.

“The petitioner appealed to the judge, and put in his petition of appeal on the 12th May 1857.

“He filed his reasons of appeal on the 9th June 1857.

“On trial of the appeal before the judge, he rejected the appeal, citing the case of Ramdhun Chuckerbuttee, 8th January 1857, (Sudder Dewanny Adawlut Decisions, page 34), as allowing no discretion for the admission of the *reasons* of appeal from decisions of moonsiffs after thirty days.

“The special appellant urges that, as the appellate court itself admitted the reasons of appeal after thirty days, he should not suffer for the erroneous act of the court. The perusal of the judge’s decision in the vernacular proves this statement to be correct.

“We admit the special appeal, to try whether this objection is not a valid one, notwithstanding the precedent cited, in the ruling of which we fully concur.”

JUDGMENT.

Under the precedent of the case decided on the 10th August 1858, Hubeeboonnissa Beebee, petitioner, we remand this case to the lower appellate court for trial on the merits.

THE 8TH MARCH 1859.

H. T. RAIKES and J. H. PATTON, ESQS., Judges, and G. LOCH, Esq.,
Officiating Judge.

Case No. 4 of 1858.

*Special Appeal from the decision of Mr. E. Jenkins, Officiating
Additional Judge of Tirhoot, dated 27th May 1857, reversing
a decree of Mr. E. Dacosta, 1st Principal Sudder
Ameen of that district, dated 26th May 1856.*

Sheikh Bukhtour, after him his son Sheikh Shubratee, (Plaintiff)
Appellant,
versus

Syud Turrahum Hossein and others, (Defendants.) *Respondents.*
Baboo Unnodapersad Banerjee, for Appellant, Ex-parte.

Where the mortgagee had filed accounts for seventeen years and endeavored to account for the absence of certain intermediate accounts, it was held that the judge, instead of dismissing the suit, because these accounts were not filed, should have accepted those that had been brought forward if found worthy of credit; and if the mortgagee were unable to account satisfactorily for the missing accounts, he should have accepted the defendants' estimate of profits for three years, and have thus determined whether the loan and interest had been liquidated from the usufruct.

THIS case was admitted to special appeal on the 7th January 1858, under the following certificate recorded by Messrs. B. J. Colvin and A. Sconce.

"Petitioner was mortgagee of a village, possession of which he had lost, having been dispossessed by the mortgagors in Asarh 1261. He therefore sued them for recovery of the balance of the loan, with interest, amounting to rs. 1594. He got a decree from the principal sudder ameen, which was reversed by the judge, on the ground that he had not filed accounts, as required by Section XI. Regulation XV. of 1793, for certain years of his occupancy, viz. 1235, 1236, 1243, 1244, 1247, 1248, and 1260.

"It is urged, in special appeal, that he had shown enough to establish that the gross rental of the village was insufficient to yield more than legal interest on the sum advanced, which was rs. 1800, and that therefore the absence of accounts for some years should not invalidate his claim.

"We find that the village having been resumed, petitioner, mortgagee, was settled with, on the admission of defendants, in 1248 F.; that the debt due to him had not been completely satisfied; and that the principal sudder ameen had inquired into the assets of the village to ascertain what profits it yielded. Defendants had asserted its rental to be rs. 275 yearly; but the principal sudder ameen had considered this an over-valuation; for the Government jumma was rs. 59 at half assets, which, therefore, could not have exceeded rs. 118. He also recorded that plaintiff had filed and proved his jumma-bundees for the years which they were for; and they showed that the assets were not more than sufficed to pay interest on the loan. He therefore calculated that plaintiff's debt had not been satisfied.

"We, with reference to the view of the principal sudder ameen, admit the special appeal, to try whether the judge was right in dismissing petitioner's suit merely for absence of accounts for the years specified."

JUDGMENT.

This appellant lent a certain sum to the defendants, which was to be repaid in one lump, and at the same time received a lease of certain villages, the usufruct of which was to be applied to the liquidation of the interest due to appellant. The lease, which extended from 1235 to 1243, provided that, in the event of the principal not being paid off in that time, the appellant should continue in possession till the debt was liquidated. In 1260 he was ousted by the defendants, who plead that special appellant had liquidated both interest and principal from the usufruct of the property ; and the special appellant, contending that the usufruct was barely sufficient to cover the interest of the loan, instituted a suit for the recovery of the principal, with interest, from date of ejection. He obtained a decree in the first court ; but this decision was reversed by the judge, on the ground that the special appellant had not filed the whole of his accounts for the period during which the property was in his possession, as required by law, and had not satisfactorily accounted for their absence, except as regards the years 1247 and 1248, and he consequently dismissed the suit.

It is urged before us, that the special appellant had filed the accounts for nineteen years, and had attested them ; that, if these were valid accounts, there were sufficient data from which the average profits of the property might be calculated for the years for which accounts had not been filed ; that the judge had pronounced no opinion as to the correctness of these accounts, but, because accounts of seven years, for the absence of which the special appellant had endeavored to explain, were not forthcoming, he dismissed the suit.

As the special appellant has filed accounts for nineteen years, and it is not pleaded by the defendants that, during the years for which accounts are not produced, there was anything beyond the usual profits from the mehal, we think the judge should have accepted, if found to be correct, the accounts which were filed ; and as plaintiff was unable to assign a satisfactory reason for the absence of the missing accounts, he should, for those years, have adopted the amount of profits as given by the defendants, and have ascertained from a calculation so made whether the principal and interest had been realised. We remand the case to the judge, for disposal with reference to the above remarks.

THE 8TH MARCH 1859.

C. B. TREVOR, Esq., Judge, and H. V. BAYLEY, Esq., Officiating Judge.

Petition No. 564 of 1858.

Application for Special Appeal from the decision of Mr. E. F. Radcliffe, Officiating Additional Judge of Chittagong, dated 16th December 1857, modifying that of Moulvee Ashruff Alee, Principal Sudder Ameen of that district, dated 1st August 1856, in the case of

Raujdoolub Ghose, representative of Ramkissen Ghose, *Plaintiff,*
versus

Omrao Singh and others, *Defendants*, Petitioners.

Baboo Ramapersad Roy and Moulvee Syud Murhumut Hossein,
 for Petitioners.

Mr. R. T. Allan, for the Opposite Party.

Plaintiff sued for possession of certain land. of which, contrary to an engagement entered into with them, he had been dispossessed by defendants, and for damages and interest on the same.

Defendants pleaded that the plaintiff had resigned the property voluntarily, and consequently they are not liable to him for any damages in the matter of short collections made previous to his resignation.

The lower court gave plaintiff a decree for possession only. On appeal, the judge gave plaintiff a decree as sought for by him.

Held, in special appeal, that the real issue in this case is, whether plaintiff voluntarily resigned the lease or was dispossessed of it. If the former, he will have no action against the defendants; if the latter, they will be justly liable for damages. This issue not having been tried below, the case is remitted to the first court for re-investigation.

It is hereby certified that the said application is granted on the following grounds.

Rajdoolub, plaintiff, instituted a suit against Omrao Sing and others, for possession of certain land, of which, contrary to an engagement entered into with them, he had been dispossessed by them, and for damages, and interest on the same, caused by his dispossession. It appears from the plaint that the plaintiff held a decree against the defendants, and, as a means of realising the sum due, agreed to take from defendants a farm for eight years of certain property, reserving rs. 800 from the collections yearly, and paying off the sum decreed gradually from it; the farm was taken in 1211 M. S., and during that year and 1212 and 1213 plaintiff remained in possession, but his collections fell short of the rs. 800 which he was to reserve in payment of the amount decreed against the defendants. He now sues for possession, with damages, measuring his damages at the sum which he collected short of rs. 800 in the years 1211, 1212, and 1213.

Defendants in their answers aver that plaintiff gave his istafa voluntarily, and that they are not liable for the short collections made by him in 1211, 1212, and 1213. He can, if he thinks fit, collect them from the ryots.

The lower court gave plaintiff only a decree for possession. On appeal the judge gave the plaintiff possession, with damages and interest, as claimed by him.

Defendants now appeal specially, urging that, as plaintiff was not dispossessed by them, but voluntarily resigned the farm; and as consequently they have not been guilty of any breach of contract, they are not justly liable to damages with interest.

On referring to the pleadings, we find that the real issue in the case has not been properly tried. The plaintiff says he was dispossessed, and that the istafa which he gave was not a voluntary one. Defendants say it was a voluntary one. Now it seems clear that, if the defendants' averment be proved, they cannot be made liable for damages. In that case plaintiff will have himself receded from the contract, and will consequently not be in a position to sue the defendants for damages on account of a breach of it on their side. If however plaintiff's allegation be proved, the defendants will justly be liable for damages. Under this view we think it necessary to remand the case to the judge, with instructions that he remand it to the principal sudder ameen, directing him to frame an issue on the point above noted and give a clear determination on it, and afterwards pass such a judgment as to damages as the justice of the case may seem to him to require.

THE 9TH MARCH 1859.

C. B. TREVOR, ESQ., Judge, and H. V. BAYLEY, ESQ., Officiating Judge.

Petition No. 1322 of 1858.

Application for Special Appeal from the decision of Mr. E. Jenkins, Additional Judge of Tirhoot, dated 7th May 1858, affirming that of Moulvee Syud Mahomed Willayat Hossein, Moonsiff of Bhawara, dated 30th May 1857, in the case of

Ramloll Chowdree, Plaintiff, Petitioner,
versus

Bhojrub Dutt Jha and others, Defendants.

Baboo Unnodapersad Banerjee, for Petitioner.

Moonshee Ameer Alee and Baboo Dwarkanath Mitter, for the Opposite Party.

It is hereby certified that the said application is granted on the following grounds.

The judge has declared the deed of sale in this case invalid, because the butwara of the property held by the vendor and a co-sharer jointly was not made by the revenue authorities under Regulation XIX. of 1814. He cites the summary case, 11th March 1844, collector of Mymensingh, petitioner, to support his judgment.

The ruling in that case is to the effect that, where an estate is partly the property of Government and partly that of individuals, a butwara must be made under Regulation XIX. of 1814. But here the judge has improperly held a deed of sale invalid, on the

in this case where the party partitioned his property with a co-sharer, by a private arrangement, that precedent had been misapplied.

Held, that the ruling in the summary case, 11th March 1844, collector of Mymensingh, petitioner, was that, where property was partly that of Government and partly of individuals, its partition should be made under Regulation XIX. of 1814, and that

sole ground that the vendor partitioned his property with his co-sharer by a private arrangement.

The case is remanded, that the judge may decide on the validity of the deed of sale and the general merits of the case upon the whole evidence on the record.

THE 10TH MARCH 1859.

A. SCONCE and C. B. TREVOR, ESQS., Judges, and H. V. BAYLEY, ESQ.,
Officiating Judge.

Case No. 250 of 1857.

Regular Appeal from the decision of Baboo Tarakant Bidyasagur, Principal Sudder Ameen of Cuttack, dated 30th December 1856.

Ramkissen Patjoshee Mahapatur, (Defendant,) *Appellant,*
versus

Hurrykissen Mahapatur, (Plaintiff,) *Respondent.*

Baboos Shumbhoonath Pundit and Kishenkishore Ghose, for Appellant.

Moonshee Ameer Alee, Baboo Kishensukha Mookerjee, and Moulvee Murhumut Hossein, for Respondent.

Held, that a release pleaded by a guardian as given by his minor ward requires clear and strong proof of its execution, and that, in a case of such relation between the parties, a release of this nature would not, even if proved, be necessarily conclusive.

Held, that defendant, having, as guardian for plaintiff, a minor, received certain bonds as part of plaintiff's share of his ancestral property, was bound to account to plaintiff for them, even if the bonds were on account of the separate transactions of the parties and irrespective of their rights as ancestral co-sharers.

Held that, where it was not shown that repayment of a mortgage of part of property was made from other than the joint funds, or that the property was other than joint ancestral, plaintiff was entitled to his share.

Held, that a julkur not being shown to be other than part of ancestral property, a farming settlement with a stranger on resumption does not destroy the proprietary title of plaintiff according to his share.

Held that, where defendant did not prove his plea that, after receipt by him as guardian of ornaments and clothes, the share of the plaintiff, he, defendant, made them over to plaintiff, plaintiff is entitled to a decree for them.

PLAINTIFF sues for one-third of certain landed property, julkur, houses, grain, lands, ornaments, or their value, and for his name to be registered as proprietor of the landed property for which he sues. The suit was laid at rs. 47,106-5-9-9, and was instituted on the 13th September 1855. No claim for mesne profits is included in it.

Gopebundoo Mahapatur, a priest at Pooree, was the great-grandfather of plaintiff and defendant. He had three sons, Duposingh, Jugutanund, and Kishenchunder; and these three held their father's property as a joint undivided Hindoo family. Duposingh and Jugut had no issue; Duposingh then adopted as his son his nephew, Puddolabh, the second son of Kishenchunder; Jugutanund adopted the third son of Kishenchunder, *i. e.* Komullochun, the eldest son of Kishenchunder being Bonmalee, who, with Puddolabh and Komullochun, lived as a joint undivided Hindoo family. Bonmalee,

having no issue, adopted plaintiff. Disputes arose between Puddolabh and Komullochun as to the shares of the property ; and the latter having, on the 21st May 1831, applied to the collector for a partition of the property, the matter was referred to arbitrators. That failing, the collector took up the case, and, by his proceeding of the 4th April 1834, divided the property into three shares : one to Puddolabh for himself, one to Puddolabh as guardian of plaintiff, and one to Komullochun ; Puddolabh receiving, on account of his being the eldest, one-tenth more than the others.

Plaintiff's averments are, that after this decision arbitrators were again appointed, who divided the whole property, real and personal, ancestral and self-acquired ; that Puddolabh and Komullochun acquiesced in this ; and Puddolabh took his own share, and also that of plaintiff in trust, and was in full possession of both ; that plaintiff demanded his own share after his majority, which was attained on 4th of Srabun 1254 ; that half the landed property, some houses, and money and grain, were made over to him, plaintiff, but the rest was withheld ; and that finally plaintiff separated from defendant's family in Kartikh 1258.

Defendant's main pleas in his answer were, that some of the joint property, such as rooms in a house, was indivisible ; that the julkur sued for was held by him under a settlement from Government as his own property, after a previous farming settlement made with a stranger by Government on its resumption, and was not now part of the joint property ; that the village of Zeerakundy having been mortgaged, the debt was repaid from defendant's own funds, and not from the joint property, and would thus revert to the mortgagors ; that plaintiff was a major in 1252, and gave defendant a full release on the 15th Jeyt 1253, having received all the money, grain, ornaments, &c., due to him for his share. Of the matters sued for, rs. 34,363 were on account of bonds, *i. e.* rs. 16,201 and the interest equal to the principal, rs. 16,201. The defendant denies that these bonds formed any part of the joint property, but were distinctly set forth in the arbitrators' proceedings as the individual and distinct transactions of each separate sharer, and pleads that the plaintiff shows nothing of what amount of the bonds had been realised, or what not, or what right he had as co-sharer in the several bonds entered in the lists given to the arbitrators of the property of each sharer. As to the ornaments, defendant pleads that plaintiff had received all to which he was entitled, and the same in respect to cash, grain, &c.

The principal sudder ameen held the *release* of 15th Jeyt 1253, pleaded by defendant, not proved. He observed it was on stamp of double the necessary value, and on paper in use for pleading and not for deeds, and was not purchased by plaintiff or his dependants ; further, that the deed was not registered, and that

the signature on it differed from plaintiff's signature on a power of attorney filed three months before the principal sudder ameen's decision in this case. The principal sudder ameen thought that plaintiff should have his share of the *ornaments* according to the list of 1833 corresponding with 1254 U. As to the *bonds*, he held plaintiff responsible to defendant for them or their value, but without interest. The principal sudder ameen considered plaintiff entitled to his share of mouzah Zeerakundy, because the arbitration award made no distinction as to it, otherwise than being a portion of the landed property to be divided between the three parties. For one-third of the whole landed property and of the *julkur*, the principal sudder ameen gave plaintiff a decree, but held certain items, such as rooms in a house, the right to a certain area at the kitchen hearth of Juggurnath, and a certain extent of idol car-ropes to be indivisible. The costs below were awarded against defendant according to the amount decreed to plaintiff.

From this decision defendant appeals ; and we have to decide, *1st*, whether the release pleaded by him is proved ; *2nd*, whether plaintiff is entitled to receive the *bonds* or their value from defendant ; *3rd*, whether plaintiff's claim to one-third of mouzah Zeerakundy is good ; *4th*, whether his claim to one-third of the *julkur* sued for is valid ; *5th*, whether the principal sudder ameen's decision as to the *ornaments* and *clothes* decreed to plaintiff, is correct.

JUDGMENT.

In respect to the alleged *release*, we concur with the principal sudder ameen that it has not been proved. Irrespective of the grounds stated by that officer for suspecting its authenticity, we consider the vague and general terms in which the document is worded were most unlikely to have been used in a paper of this kind, which would have specified the details of property received for plaintiff by defendant, and also in the same detail what had been made over to plaintiff, and for which such a release would be binding on him, especially looking to the character in which the parties stood of guardian acting as trustee for a minor, and the period at which it purported to have been given, *i. e.* about that of the attainment of his majority by that minor. Independently, however, of the *terms* of the document, we doubt whether, even if a document of such a character had been executed at all between the defendant, the guardian, and the plaintiff, the minor, at the particular period it was alleged to have been, we should have accepted it as conclusive, considering the fiduciary relation in which the guardian stood towards the minor.

As to the debts secured by *bonds*, it is argued for appellant that these cannot be decreed to plaintiff, as the lists of property of each

sharer, filed with the arbitration award of 1838, specify them to be "personal debts due to each sharer from the subordinate pilgrim agents, and a matter for adjustment by each sharer on his own account." It is further urged, that the arbitration award speaks of them as "debts which shall be adjusted, paid, and recovered, as individual debts." In fact that these debts are not part of the joint property divided between the three sharers. We are of opinion that, as it is clear defendant received these bonds as part of the plaintiff's share of the property, when he (defendant) acted as guardian and trustee for plaintiff, then a minor, he must account to plaintiff for them or for their value. That he himself accepted this liability is clear from his own petition of the 18th January 1838, wherein the bonds are referred to as an item of property belonging to each sharer respectively, and he acknowledges the receipt by himself for plaintiff of the whole share of the latter. We accordingly consider the principal sudder ameen correct in his order, that the defendant should be responsible to plaintiff for these bonds or their value.

In respect to plaintiff's claim to one-third of mouzah Zeerakundy, defendant, appellant, nowhere shows that the payments, he alleges he made from his own funds, to repay the mortgage and recover the property, were so made, or what those payments were, or when made. As the case stands, the village is one of those forming the landed property, to one-third of which plaintiff is entitled; and the payment to redeem the mortgage must be considered to have been made from the rents of the joint property, as the contrary is not shown. Thus, therefore, the principal sudder ameen's order in this matter also must be affirmed.

The *julkur* is claimed by defendant on the ground that after resumption it was first farmed to a stranger, and then his father engaged for it on his own account. But it is nowhere shown that this *julkur* was other than part of the joint property; and such a settlement would not annul the proprietary rights in it: and to one-third of those rights plaintiff is entitled as much as to that proportion of the rest of the property.

The principal sudder ameen has decreed to plaintiff so much of the ornaments and clothes sued for as were in the list with the award of January 1838. The defendant's plea, that these articles had all been duly made over to plaintiff at his marriage and on other occasions, is not substantiated; but he does not prove this, or show in any way what of these articles, at what periods, were made over to plaintiff. We therefore think the principal sudder ameen correct also in his view on this subject.

We dismiss the appeal, with costs on appellant, proportionate to the amount decreed against him below.

THE 10TH MARCH 1859.

A. SCONCE and C. B. TREVOR, ESQS., Judges, and H. V. BAYLEY, ESQ.,
Officiating Judge.

Case No. 655 of 1857.

Regular Appeal from the decision of Mr. R. P. Harrison, Officiating Judge of Hooghly, dated 24th January 1857.

Madhubchunder Roy, (Defendant,) *Appellant*,
versus

Shamanund Gosain and Achootanund Gosain, (Plaintiffs,)
Respondents.

Baboos Ramapersad Roy and Kishenkishore Ghose and Mr. R. T. Allan, for Appellant.

Moonshee Ameer Aleé and Baboos Shumbhoonath Pundit, Dwarkanath Mitter, Unnodapersad Banerjee, Aushootosh Chatterjee, and Roy Sreenath Sein, for Respondents.

Suit laid at Company's Rupees 1,89,854-6-6.

Suit to set aside certain leases set up by defendant, appellant, as having been executed by plaintiffs. The zillah judge has held the leases not to be genuine; and in appeal that judgment is upon the evidence affirmed.

THE respondents, Achootanund Gosain, and his nephew, Shamanund Gosain, son of Rohineenundun Gosain, deceased, are the admitted proprietors, in equal shares, of an assessed estate, named chur Bologoree, and of a rent-free estate named turuf Bologoree; and they have brought this suit to set aside as false and fabricated four leases, which the defendant, appellant, Madhubchunder Roy, professes to have acquired from them severally for their half shares in the two properties mentioned. The lands in question have for many years been leased, by successive engagements, to the proprietor of the Sooksagur indigo factory: this factory devolved on Madhubchunder Roy, appellant, by purchase, in Assin 1260, and it is allowed that the latest lease of the above two estates, which expired at the close of the Bengalee year 1261, expired after the Sooksagur factory had passed to Madhubchunder Roy, and that this person was the *de facto* tenant for the latest year of the lease. So far then, to the close of 1261, the relation of the parties before us as landlords and tenant, with respect to chur Bologoree and turuf Bologoree, is uncontested: but early in 1262 a dispute broke out. The two proprietors, Achootanund and Shamanund, professed to have assumed possession of the two estates, as of course, on the expiration of the last lease. They were opposed, however, by Madhubchunder Roy, who asserted that the lease had been renewed to him by both proprietors for thirteen years, from the commencement of 1262 to the close of 1274: and in consequence of the violence of their altercation, the magistrate having taken cognizance of the case under Act IV. of 1840, the possession of the former was affirmed, first by that officer and afterwards on appeal by the session judge. Accordingly the

proprietors, Achootanund and Shamanund, have instituted this suit to quash the possessory award made in favor of Madhubchunder Roy, and to declare the leases purporting the renewal of the farm to be invalid. The sole question raised then in this suit is a question of fact, that is, the authenticity of the renewed leases; and necessarily the onus of establishing that authenticity rests on the defendant, Madhubchunder, who produces the deeds as emanating from the proprietors and constituting him a tenant for years under them.

The case which the defendant, appellant, endeavors to substantiate for himself is this. Being in possession under the old lease, to the close of 1261, Madhubchunder Roy asserts, and it may be conceded, that it was highly important to him to make arrangements in the course of that year for sowing indigo seed, so as to secure the crop in 1262, for which alone the lease was valuable as an adjunct to his factory. Accordingly, evidence is adduced to show that Madhubchunder, at the close of Assin 1261, went to communicate with the Gosains, relative to the renewal of his lease; that on 3rd or 4th Kartikh following, the Gosains, who lived on the opposite bank of the Hooghly, at Bologoree, crossed over to the Sooksagur factory, and discussed with Madhubchunder the terms of the new lease; that the terms were verbally agreed upon; that in consideration of the renewal, the sum of rs. 1200 was to be paid by the tenant; that on 7th Pous, the Gosains, Achootanund and Shamanund, went to the defendant's factory and received rs. 600, being one-half of the consideration money; that in the latter half of the month of Cheyt, after mutual discussion, the drafts of the deeds intended to be executed were prepared; that on the morning of 3rd Bysakh 1262, the Gosains again proceeded to the defendant's factory, when rs. 300 was paid to each of them; the kuboolyuts for the leases of the khiraj and lakhiraj estates and the security bonds were executed and delivered by Madhubchunder and his surety, Denonath, and on the other hand the pottahs were executed and delivered severally by the two Gosains; that powers of attorney were at the same time executed to enable the agents named therein to register the deeds, that is, Shamachurn and Doorgachurn, to register the pottahs on behalf of the lessee, and Kashinath Palit, a mooktear of the Gosains, to register the kuboolyuts and security bonds on behalf of the lessors; and that on 1st Jeyt 1262 the pottahs were registered in the office of the register of deeds at Hooghly.

To support this succession of events, we have no lack of evidence. We can neither say that any of the links in the transaction is supported by too few witnesses, nor that, so far as we see, any circumstances personal to the witnesses affect the credibility of their testimony. Nevertheless, we unhesitatingly concur with the zillah

judge in disbelieving the (defendant's) appellant's witnesses, and in holding the leases set up by him were not executed by the Gosains, the respondents in this appeal.

In the first place, we observe that our reliance on the trustworthiness of the transaction is affected by the absence of any written evidence of the contract said to have been verbally entered into in Kartikh 1261, or of the receipt by the Gosains of an instalment of the consideration money in the following month of Pous. The appellant brings up his own accounts, to show that on 7th Pous rs. 600 were disbursed on account of the Gosains. But his books were in his own control: and the fact remains that, up to the asserted execution of the deeds, the 3rd Bysakh, the Gosains are not shown by any writing to have expressed directly or indirectly their assent to the contract. In truth, no reason is assigned for delaying the execution of a contract which is said to have been matured in Kartikh 1261: and whether we look to the strong intent of the defendant, appellant, to secure a renewal of his lease, or the ready assent of the lessors to come into his terms, the delay in giving the contract a written recognition for so many months detracts from the credibility of the verbal completion of the contract.

Again, another remarkable and unexplained circumstance is the mode of effecting the registry of the pottahs. What the witnesses for appellant say is, that first the principals exchanged deeds; and after, that the Gosains gave the pottahs to the mooktears, Shamachurn and Doorgachurn, for the purpose of being registered. Both these persons profess to have been accidentally present at the factory, and when the deeds were handed over to them, they are said to have made arrangements among themselves to meet at the Sooksagur Ghât on the last day of Bysakh, and thence to start for Hooghly for the purpose of registering the pottahs. Meanwhile, we are given to understand that these deeds were left in charge of Doorgachurn. Thus, it seems to us, both the assumed indifference of the defendant, appellant, as to the custody of the pottahs throughout all Bysakh, and the unaccountable postponement of the registry, create the strongest presumption that the execution of the deeds did not take effect on the 3rd Bysakh as represented. Not only were the pottahs not registered till the 1st Jeyt, but the kuboolyuts have not been registered at all. This last omission may be ascribed to the Gosains, who are said to have had the custody of the deeds; nevertheless non-registry indicates an incomplete and inharmonious arrangement, and, taken in connection with the objectionable course followed with regard to the registration of the pottahs, deepens our impression of the fraud and falsehood involved in the imputed execution of the deeds.

So it seems to us that the conduct ascribed to the Gosains throughout, as if to exhibit their thorough assent to the renewal of the lease, is unusual and improbable: they are said to have gone to the factory on 3rd or 4th Kartikh 1261 to complete the preliminary arrangement; again in Pous to receive half of the consideration money; lastly, on 3rd Bysakh to execute the deed. And again, an unaccountable explanation is volunteered as to the preparation of the fair pottahs: one Kenaram Dass, a casual hanger-on, professes to have been employed by the Gosains to write them out, from rough drafts, on stamp paper, but not, he says, at their own house, for he was told to write at the house of a neighbor, Sreemunt, lest at the Gosains' own house he should be disturbed, and the stamps should, from some mistake, be injured.

Again, at the hearing of the appeal, the strongest presumption of fabrication was made clear to us from the appearance of the signature of Achootanund Gosain on the two pottahs ascribed to him. One pottah, as already stated, includes the lakhiraj estate, the other the assessed estate. So the old lease was covered by two pottahs for each of those mehals. Now the signature of Achootanund on each of the old pottahs, as might be expected, slightly varies in form; and what is most remarkable now is, that the signature on each of the new pottahs is an exact *fac simile* of the signature on the corresponding old pottah. A fresh signature on two deeds, as in these new pottahs, might slightly vary in the formation of the letters and general style: but in the instances before us the writing takes the character of stereotype, the signature on the lakhiraj deed being a faithful copy of the signature on the old lakhiraj pottah, while the correspondence on the two pottahs for the khiraj estate is equally faithful.

The pottahs purport to have been executed on 3rd Bysakh 1262, and the registration was deferred, as has been explained, to the 1st Jeyt. Within that interval no publication of the renewed lease was made. Now it happened that, on the night of 3rd Bysakh, a theft, attended with the supposed murder of the thief, occurred in one of the villages of the farm. Next day, the 4th, one Sreekunt, describing himself as naib of the farmer Madhubchunder, forwarded a written report of the occurrence to the zemindars; and the latter, on the same date, by their manager Bamachurn, transmitted the same report to the magistrate, accompanying it with what, under the circumstances of this case, may be characterised as a peculiar statement. The zemindars thought it necessary to account for the interference of the naib of, as was said, the late farmer. The lease had expired, it was observed, in 1261, but the naib of the late farmer having not given in his accounts was still on the spot. This report was received openly

by the magistrate on 4th Bysakh; and it amounts, at all events, to a plain repudiation of a new lease. Thus, while we have on the part of the lessee no publication of the renewed lease till the registration on 1st Jeyt, we have on 4th Bysakh, on the part of the zemindar, that is, on the day following the asserted renewal of the farm, an open declaration, that the relation of landlord and tenant, formerly existing, had terminated.

We have no difficulty in conceding to the appellant that, for the purpose of continuing to his factory the supply of indigo plant upon which the factory has hitherto been worked, he had a very important object in securing a renewal of the expiring lease. We may also allow that appellant, being in possession in 1261, had made arrangements for the sowing of indigo which could not be cut till the early months of 1262. Such considerations may at the most suggest some not very material probability in favor of appellant's case, but are quite inadequate to determine the conclusion to which we come with respect to the main, and indeed only, fact upon which we have to adjudicate.

We dismiss the appeal, with costs.

THE 14TH MARCH 1859.

H. T. RAIKES and J. H. PATTON, ESQs., Judges, and G. LOCH, ESQ.,
Officiating Judge.

Case No. 511 of 1856.

Regular Appeal from the decision of Baboo Gobindchunder Chowdree, Principal Sudder Ameen of Moorshedabad, dated 5th August 1856.

Gunnesh Dass Aghurwall, Mooktear and Gomashta of Hurdialjee
Ramseek Doss, Insurance Company, (Defendant,) *Appellant*,
versus

Pertab Singh Dooghur, (Plaintiff,) *Respondent*.

Moonshee Ameer Alee and Mr. A. Carapiet, for Appellant.
Baboos Ramapersad Roy and Bungsheebuddun Mitter and Mr.
R. T. Allan, for Respondent.

Suit laid at Company's Rupees 8852.

Appeal dismissed, since the real defendant had not put in legal security in the lower court, and, from the judgment there passed, could not be entitled to appeal through agent.

A PRELIMINARY objection was taken to the hearing of this appeal by the pleader for the respondent, on the ground that the appellant had failed to furnish the security required under the provisions of Regulation XIV. of 1829. He pleaded that the real appellant in this case was Hurdialjee, an inhabitant of Jeypore, situated beyond the limits of the Company's territory, and that the law quoted enacts that every person, being a resident of a foreign country, instituting or defending an original suit, or prosecuting or defending an appeal,

shall furnish security for all eventual costs of suit, and further, that no appeal shall be admitted unless the required security be furnished. He urged, moreover, that, as defendant in the original cause, Hurdial was required to conform, and did conform, to the requirements of the law in this respect ; and that the objection, now raised by him against the hearing of the appeal, was urged both in the zillah and this Court.

The appellant's pleader argued that, as the respondent had designated his client an inhabitant of Zeeagunge, zillah Moorshedabad, in the plaint, he was debarred from pleading Regulation XIV. against the hearing of his appeal ; that his furnishing the security demanded in the original action was an inadvertence and quite unnecessary ; and that the transactions comprised in the suit ranged over the localities of Patna, Moorshedabad, and Mirzapore, cities lying within the limits and jurisdiction of the Company's courts.

On reference to the record, we find that the real defendant in the cause was Hurdialjee, and that, as a resident of a foreign territory, he was on that account required to furnish the security prescribed by the law ; that Gunnesh appeared in the suit under a power as agent on the part for his principal, Hurdial ; and that it was Gunnesh, and not Hurdial, who was styled a resident of Zeeagunge in the plaint. This appeal, therefore, can only be regarded as the appeal of Hurdialjee ; and as he has failed to make himself *rectus in curia* by providing the security the law demands, we are of opinion that he cannot now be heard. We therefore dismiss his appeal, with costs.

THE 14TH MARCH 1859.

H. T. RAIKES and J. H. PATTON, Esqs., Judges, and G. LOCH, Esq.,
Officiating Judge.

Case No. 166 of 1857.

Regular Appeal from the decision of Mr. J. Weston, 2nd Principal Sudder Ameen of Tirhoot, dated 9th December 1856.

Baboo Doorga Dutt, (one of the Defendants,) *Appellant,*
versus

Baboo Gunnesh Dutt, (Plaintiff,) and others, (Defendants),
Respondents.

Moulvee Syud Murhumut Hossein and Mr. A. A. Sevestre, for Appellant.

Baboo Ramapersad Roy and Moonshree Ameer Alee, for (Plaintiff,) Respondent.

Suit laid at Company's Rupees 5400.

The mortgagor failing to prove local custom of redeeming mortgage by paying the principal debt, and interest from the date of notice of foreclosure only, and such custom being not the law, his claim to a title to redemption could not be sustained.

THIS was a suit for foreclosure of a mortgage, which the principal sudder ameen decreed in favor of the mortgagee, because the mortgagor had forfeited the equity of redemption by neglecting to liquidate the amount advanced, with interest.

The mortgagor has brought this appeal, and pleads that he is entitled to redeem, because he has liquidated the principal of the debt, with interest from the date of notice of foreclosure, in conformity with the terms of the bond and local usage, which admits of this mode of settlement in mortgage transactions when no stipulation for the rate of interest is specified in the deed. In proof of the existence of this local custom, the appellant's pleader lays before the Court two orders of the civil court of the zillah, which, he assumes, show that the payments, made in the manner pleaded in satisfaction of the mortgages involved in those proceedings, were accepted, and the mortgages held to be discharged thereby. But the instances quoted afford, in our opinion, no proof of the rule or usage pleaded; for the orders referred to were merely such as would be passed in the common course of procedure, on a mortgagor's paying into court such amount as he deems to be due to his creditor, and which the court is bound to receive without question.

The law, Section II. Regulation I. of 1798, expressly enacts that, when a mortgagor, after issue of notice of foreclosure, wishes to pay off the debt and redeem the property, he must deposit the principal sum, but with the stipulated interest thereon, not exceeding the legal rate of 12 per cent., or, if interest be payable and no rate has been stipulated, with interest at the established rate of 12 per cent. Again, as regards the terms of the contract, which the appellant professes to have discharged in all their entirety, we observe

that they covenant only for the repayment of the loan with interest, without any specification as to its rate or the mode of settlement.

We have, therefore, to determine whether the appellant, in paying the principal, with interest from date of notice of foreclosure, has conformed to the requirements of the law above quoted. That law, however, distinctly declares that, where no rate of interest has been recorded, interest according to the established rate of 12 per cent. must be paid up by the mortgagor. Now the mortgagor, appellant, excuses himself from payment at this rate on the ground of local custom, which he asserts justifies him in calculating interest as payable from the date of notice only; but he not only fails to satisfy us that such is the custom, but, even if such custom prevails, we are of opinion that it could not override the law in any case brought up for judicial decision before the courts of the country.

We, therefore, see no reason to interfere with the decision passed below, and reject the appeal, with costs.

THE 14TH MARCH 1859.

H. T. RAIKES and J. H. PATTON, Esqs., Judges, and G. LOCH, Esq.,
Officiating Judge.

Case No. 317 of 1857.

*Regular Appeal from the decision of Baboo Kassissur Mitter,
Principal Sudder Ameen of Hooghly, dated 17th January
1857.*

Aga Mahomed Kumul Tehranee, (Plaintiff,) Appellant,
versus

Aga Abbas Tehranee, (Defendant,) Respondent.

Baboos Shumbhoonath Pundit and Kishenkishore Ghose, for
Appellant.

Moonshee Ameer Alee, for Respondent.

Suit laid at Company's Rupees 14,740-2g.-2k.

It appears that Haji Kurbulye Mahomed, grandfather of plaintiff and great-grandfather of the defendant, established an imambara in Mirzapore, in the town of Chinsurah, and assigned certain wuqf lands for its support. No mootuwallee was appointed by the endower; and after his death the plaintiff's brother held possession of the wuqf lands, and performed the duties of mootuwallee. After his death the plaintiff sued his son, the present defendant, to recover possession from him of the whole of the wuqf property. This suit was amicably settled, and a solanamah filed, by which both

When a party sought to recover possession of wuqf property, and to be allowed to exercise the office of mootuwallee jointly with the defendant, held, that, as the plaintiff had been proved by a judicial decision

of a civil court to have misappropriated part of the wuqf property, he could not look to the court to assist him, as he did not come into court with clean hands.

litigants were to be considered as mootuwullees. On the death of one Rumzan Alee, the gomastah, who had charge of the collections and other affairs of the wuqf property, one Nujeeboodeen was appointed, for whom defendant became surety. The appointment appears to have been unsatisfactory to the plaintiff, and quarrells again broke out. Plaintiff charged the gomastah with appropriating the collections, and not furnishing funds for the celebration of the mohurram, and keeping back the accounts of the estate; and to recover these accounts he instituted a summary suit against the gomastah under Section XX. Regulation VII. of 1799. Defendant filed a petition, stating that the accounts had been delivered to him; and the collector ultimately dismissed the suit on the 21st February 1854. Defendant then, in collusion with the gomastah, appropriated the collections of the wuqf property, and so ousted the plaintiff; and plaintiff now sues to recover possession of his share of the wuqf property, and to be restored to his office of mootuwullee. Previous to the decision of the summary suit brought by plaintiff against the gomastah, it appears that a suit had been brought by the defendant on the 19th November 1853 against the present plaintiff, to recover from him certain properties belonging to the imambara which plaintiff was alleged to have appropriated, and he obtained a decree against plaintiff for the value of the said properties, amounting to upwards of rs. 1500.

The principal sudder ameen dismissed the suit, on the ground that the plaintiff had, in the former suit, been convicted of misappropriation of the property belonging to the wuqf estate, and the futwa of the law officer declared that a mootuwullee might be removed for such an offence.

It is urged in appeal that the principal sudder ameen has misunderstood the purport of the futwa; that, admitting plaintiff to have misappropriated part of the wuqf property, he could only be dismissed from his situation of mootuwullee by the Government or the endower, but his coadjutor in office and co-sharer in the wuqf property had no authority to deprive him. He therefore proposed two issues: *first*, supposing plaintiff to have been guilty of misappropriation, yet, under the law and circumstances of the case, is he not entitled to be restored? and, *second*, whether misappropriation was made by the plaintiff, appellant, or by the defendant, respondent.

We find from the decree of the additional principal sudder ameen, dated the 20th April 1855, that the plaintiff, having taken away certain properties belonging to the imambara, which he failed to restore, was adjudged to pay their value. That decision has never been reversed. But it is urged by the appellant that he should be restored to

possession notwithstanding, in order to his being dismissed in a formal and regular manner. He should be restored to office and possession that the defendant might bring a regular suit for his removal. As, however, the appellant is out of office at present, and has been held liable, under a judicial decree, to what amounts to misappropriation, we think it would only prolong litigation uselessly were we to entertain the validity of such an objection; and as he does not come into court with clean hands, we think he has no right to look to the court to assist him in recovering his lost office. A somewhat similar case is reported in the Decisions of this Court of 1850, page 447, Beejoygovind Burraul, petitioner, in which the Court refused to assist the petitioner in removing defendant from the office of shebayet, on the plea of injury and loss to the endowed property, as it was found that the petitioner had also committed acts injurious to the property. It is urged that the second plea in appeal, though distinctly put in issue in the pleadings, has been overlooked by the lower court. On reference to the plaint, we find it to be stated that the defendant, colluding with the gomastah, had appropriated the collections from the wuqf property, and had ousted the plaintiff; but beyond this very general averment we find no distinct acts of misappropriation charged to the defendant, and we think it therefore unnecessary to enter further into this plea. We confirm the order of the lower court, and dismiss the appeal, with costs.

THE 14TH MARCH 1859.

H. T. RAIKES and J. H. PATTON, Esqs., Judges, and G. LOCH, Esq.,
Officiating Judge.

Case No. 654 of 1857.

Regular Appeal from the decision of Mr. E. S. Pearson, Officiating Additional Judge of Dacca, dated 23rd March 1857.

Mahomed Hafiz and others, (Defendants,) *Appellants*,

versus

Moulvee Abdool Alee and others, (Plaintiffs,) *Respondents*.

Baboo Kishenkishore Ghose and Mr. R. T. Allan, for Appellants.
Baboo Shumbhoonath Pundit and Bhoobunmohun Roy, for Respondents.

Suit laid at Company's Rupees 5698.

THIS suit was brought by the plaintiff Abdool Alee, who alleged that he was the old proprietor of the estate in suit, and appointed the defendant Gholam Russool as his manager; that the defendant, while acting in that capacity, had wilfully withheld payment of the Government revenue, and caused the sale of the estate for Govern-
As plaintiff, even if he had not authorised purchase in the name of another of the estate sold for arrears of

revenue under the old sale law, had made use of the transaction as if he had, he was disqualified (under precedents) from maintaining an action for possession, &c.

ment arrears ; that he afterwards heard that Gholam Russool had himself purchased the estate in the name of Lukheekant Soor ; and on plaintiff's seeking from him some explanation of his conduct, Gholam Russool informed him he had purposely thrown the estate into arrears, and purchased it in the name of Lukheekant for the benefit of the plaintiff, to enable him to enhance the rents of it ; that in accordance with this admission, Gholam Russool caused Lukheekant to execute an ikrar or acknowledgment of trust in favor of the plaintiff, in which he allows that the purchase money was supplied from the collections made on plaintiff's account, that the purchase was for his benefit, and that he engaged to execute a kubala or bill of sale in the plaintiff's favor ; that no kubala was ultimately executed, and in the end Gholam Russool, having proved treacherous, had secured the transfer to himself, and had settled the property upon his wife, who had devised it by will to her son Mahomed Hafiz.

The defendants, with the exception of Mahomed Hafiz, denied all this, asserting that the sale was caused by no fault of theirs ; that Lukheekant was a *bond fide* purchaser, who had subsequently transferred the estate in due form to the defendant Gholam Russool ; that plaintiff's suit was founded on the assumption of a secret trust in his favor, which, if true, was a contravention of the sale law, and could convey to him no legal ground of action ; but the defendant denied execution of the ikrar and purchase of the property from the plaintiff's funds. The defendant, Mahomed Hafiz, at first admitted the plaintiff's right, but subsequently withdrew his statement, asserting that plaintiff had induced him to make it on the promise of rs. 4000.

The additional judge, whose judgment is given at pages 57 to 63 of the printed Decisions of zillah Dacca, of March 1853, has held that plaintiff had established, by documentary evidence, the genuineness of the ikrar, and the truth of the purchase being benamee and for his benefit. He considered the fact of the plaintiff's having so acquired the estate to be no bar to the action, as the sale had been made under Regulation XI. of 1822, and not under Act I. of 1845 ; and the purchase, moreover, although benamee, had not been made with the cognizance and consent of the plaintiff. For these reasons the judge decreed plaintiff entitled to recover the property.

On the facts of the case, appellants' pleader has pointed out to us that the defendant Gholam Russool was appointed manager by plaintiff on 7th of Joistee 1245 ; that the sale for arrears took place in the month of Kartikh following, or about five months after Gholam Russool's appointment ; that the sudder jumma of the estate is rs. 1898-10-8, while the arrears, for which it was sold, amounted as per lotbundee to 5898-15, being an accumulation of balance

during three years previous. The pleader then asks how it was possible that this estate could have been sold for arrears accruing during the defendant's superintendence, as alleged by the plaintiff. The pleader, however, though maintaining that no benamee purchase had been made for the plaintiff's benefit, argued that the precedents of this Court, *Ramkishen Dass versus Bhuruknath Singh*, decided on the 8th July 1852, before a bench of five judges, and *Khajeh Mahomed Mehdee versus Mussamut Jeolulchun Koonwur*, of the 7th December 1853, laid down the principle, that no action can be maintained for the recovery of an estate purchased for him benamee at a Government sale, even when the sale was effected under the provisions of Regulation XI. of 1822; and on these precedents the pleader relied, as showing that no such action as the present can be maintained in our courts under any circumstances. The pleader also urged that the assumed ignorance of the plaintiff at the time of the purchase could be made no plea in his favor, as, by his own showing, he acquiesced in the purchase as soon as he was made aware of it, and thus adopted all the responsibility flowing from the acts of the other parties.

The pleader for respondent questioned the applicability of the precedents cited on the other side, maintaining that, as the purchase for the plaintiff was made without his knowledge and without instructions, a distinction is discernible between the circumstances detailed in the present suit and those of the cases alluded to.

JUDGMENT.

The first case relied upon by the appellants' pleader is that of *Ramkishen Dass* and others *versus Bhuruknath Singh*, of the 8th July 1852, and will be found at pages 651 to 657 of the printed Decisions of that year. The plaintiff in that case claimed certain lands bought at a revenue sale for himself in the name of another person. The first court held that the purchase had been made, as stated, for the plaintiff, and decreed to him possession. The judge, in appeal, ruled that, as the claim was founded on a benamee, or fictitious purchase, and such purchases were illegal under Regulation XI. of 1822, the suit of the plaintiff was not cognisable by the court, and rejected the claim. A special appeal was then admitted by the Sudder Court, expressly to try whether a benamee purchase at a sale under Regulation XI. of 1822, and consequently previous to the promulgation of Section XXI. Act I. of 1845, which positively prohibits the entertainment by the courts of any such claim, was cognisable by the courts or not. As the current of decisions in this court up to that time had been against the recognition of such claims, the case came before a bench of five judges. The Court (Mr. W. Jackson dissentient) remarked as follows :—

"Sir R. Barlow, Messrs. J. R. Colvin, A. J. M. Mills, and R. H. Mytton.—We do not find that the plaintiffs state that they gave

any power to the defendants to buy for them in their (the plaintiffs') names. It is no part of this case that the defendants deviated from instructions given to them as to the names in which the purchase should be made.

"Following the precedents* of the Court from the earliest date, we find that the current of its decisions on the subject of benamee purchases, from the enactment of Regulation VII. of 1799 to the date of the last Act quoted, Act I. of 1845, has been to discourage, by judicial authority, all such proceedings. The spirit and intent of all the legislation on the subject which had taken place has been, and is, in our judgment, adverse to the admission of suits and recognition of claims founded on benamee transactions at public sales. The recent laws of 1841 and 1845 appear to us to be based on a most wholesome and sound principle, which, though perhaps not so clearly expressed in the previous laws, runs through the whole course of them, as construed by the former judges of this Court, and the decisions to which reference has been made in the course of this argument. We are unwilling to go against those decisions, which, though they have not a clear and explicit sanction of the terms used in the law, as it now stands, are in our judgment fully borne out by the spirit and meaning of the law under which they were passed. On the contrary, we think it right and proper to stand by them. The principle upon which they rest is thus stated in the decision, *Sudder Dewanny Adawlut*, December 28th of 1826, (present: Messrs. *Leycester and Dorin*): 'The plaintiff, as a contravener of the law, cannot be aided in the recovery of the property, and it makes no difference that his opponent is in the same predicament. It is not in favor of the defendant that the Court refused aid to the plaintiff; but because it is improper to aid the plaintiff in benefitting by his contravention of the law.'

"We reject the appeal, with costs."

This judgment shows that, in the opinion of the Court, the purchase of lands at a Government sale, under Regulation XI. of 1822, in the name of another, is opposed to the policy of those laws which were in force before the promulgation of the more recent Acts of 1841 and 1845; and that, although the recognition of such claims by the Court was not expressly prohibited in terms, until the publication of those Acts, such suits were deemed inadmissible, and the plaintiffs in such actions, as contraveners of the law, could not be aided by the Court in the recovery of the property. This ruling of the Court has been followed on subsequent occasions, as shown in the other case adverted to by appellants' pleader, *Khajeh Mahomed Mehdee versus Mussumut Jeolulchun Koonwur*, a

* The precedents are grounded upon the law, Regulation VII. of 1799; but the principle of Regulation XI. of 1822, under which the present sale was effected, is identical with that of the law of 1799 on this point.

regular appeal decided on the 7th December 1853, being also a suit founded on a benamsee purchase made at a sale held under Regulation XI. of 1822. We have therefore no doubt that there is sufficient authority for declaring, that purchases of the nature referred to, when made at sales under Regulation XI. of 1822, are contraventions of the law then in force; and that actions to enforce the rights of such purchasers are not maintainable in our courts.

It is, however, contended by the pleader of respondent, that his client never employed the defendant, Lukheekant, to buy the estate for him, and that the purchase was made without his previous knowledge or consent. But we fail to discover any substantial distinction between the case of a plaintiff, who has employed an agent for the express purpose in question, and one who, affecting to know nothing of the purchase at the time, seeks afterwards to take every advantage of the transaction, and to secure to himself the title so acquired. Such a person is an aider and abetter of the original deception, and must, under the law, be held subject to all consequences which the law prescribes against those who contravene its provisions.

Under the precedents then, above referred to, we hold plaintiff to be disqualified from maintaining an action for this property on the grounds disclosed in the plaint, and, reversing the decision of the judge below passed in his favor, we decree this appeal for the appellants, with *all* costs in their favor.

THE 14TH MARCH 1859.

H. T. RAIKES and J. H. PATTON, Esqs., Judges, and G. LOCH, Esq.,
Officiating Judge.

Case No. 768 of 1857.

Regular Appeal from the decision of Baboo Punohanun Banerjee, Principal Sudder Ameen of Rajshahye, dated 9th May 1857.

Brindabunchunder Mozoomdar, (Plaintiff,) Appellant,
versus

Roopmunjooree Chowdrain, mother and guardian of Nobocoomar Sirkar, (minor,) and Juggutchunder Sirkar, (Defendants,) Respondents.

Baboo Ashootosh Chatterjee, for Appellant, Ex-parte.

Suit laid at Company's Rupees 5281-14a.-4½g.

THE plaintiff in this suit sued to recover the sum of rs. 5281-14-4½, Claim to a refund of part of rent paid, as with interest, under the following circumstances. founded upon stipulations between the landlord and tenant, dismissed, there being no evidence.

He states that he took certain landed property from the defendant, on a farming lease of five years from 1256 to 1260, at a rent

of rs. 3095-4-13, from which a deduction of rs. 800 as expenses and farming profits was made, leaving a net rent of rs. 2295-4-13 ; but it was stipulated under the terms of the lease, that, as the rental agreed upon was estimated upon the amount entered in the ekjye papers, it should be subject to re-adjustment in the event of the real assets of the property falling short of the amount therein recorded ; that plaintiff paid the full jumma of rs. 2295 agreed upon during the continuance of the lease, but as the real assets turned out to aggregate only some rs. 1238 per annum, plaintiff claims a refund of the amount in suit, being at the rate of rs. 1056 yearly, the extent to which the assets of the mehal proved deficient.

The defendant denies such deficiency, and points to the fact of Belmareeah Mehal having been let in farm for rs. 500 yearly, and included in plaintiff's farm, yet only rated in his accounts at rs. 357-2-8 ; that defendant held only 4 annas of the estate, which constituted plaintiff's farm, 8 annas being held by Ramkomul Sirkar and 4 annas by Doorgasoondur ; that all the shareholders collect from each ryot in proportion to their respective shares, and Ramkomul had given in putnee 4 annas of his moiety of the estate at a jumma of rs. 2223, receiving also a bonus of rs. 2000, which he would hardly have got if the assets of the property had deteriorated to the extent pleaded by the plaintiff ; that, moreover, Ramkomul had excluded from this putnee the whole of the jote and dewutter lands, whereas those lands were included in plaintiff's farm, and that plaintiff had realised the rents in accordance with the ekjye papers made over to him.

The principal sudder ameen dismissed the plaintiff's claim, observing that the plaintiff had been unable to adduce any satisfactory evidence of the deficit claimed by him.

In this appeal we have been referred by appellant's pleader to the evidence on the record.

This chiefly consists of the jumma-wasil-baquee papers filed by the plaintiff, as showing his actual receipts from the mehal during the period he held the farm of the property. These papers are supported by the statement of plaintiff's witnesses, who are, however, his own servants, and who were concerned in the collections. The evidence of these people was not deemed sufficiently trustworthy by the court below to be at once relied upon, and the moonsiff of Belmareeah was employed by the court below to make enquiries in the mehal as to the real value of the rents at the time referred to ; but the moonsiff reported that many of the then ryots had died or abandoned the lands, and that the greater part of the lands were cultivated at one season only, and the cultivators were then at a distance, so that he could come to no proper determination on the point, but that plaintiff's accounts, as verified by his people, showed the collections to have been as entered therein.

This of course was considered by the principal sudder ameen to be no assistance in guiding him to any satisfactory conclusion on the matter ; and he therefore called upon the plaintiff to adduce, as witnesses, those who had made collections at the time referred to for the other shareholders of the same estate. In compliance with this requisition, plaintiff brought forward a mohurrir who had been employed by Ramkomul Sirkar, the 8 annas shareholder, and who produced some papers purporting to be accounts of collections during 1256 ; but the whole of these papers were considered by the principal sudder ameen to be spurious and fabricated for the occasion, as the mohurrir, while admitting them to be only rough drafts of the real papers, could not satisfactorily account for his own signature being affixed to such drafts, nor why, after dismissal, he had been induced to keep such papers in his own possession for so long a time.

As this appeared to be all the evidence the plaintiff had submitted to the lower court, we agree with the principal sudder ameen in considering it quite inadequate to establish by itself a case for the plaintiff. The pleader has argued that, as one condition of his kuboolyut stipulated that the defendant should send her people to compare the existing assets with those represented in the ekjye papers, and that defendant, having been called upon to do so, neglected compliance, she should therefore now be bound to show that the ekjye papers were substantially correct. But we observe that no formal notice to this effect is said to have been sent to the defendant, and that mere verbal messages are spoken of. We therefore see nothing in this plea to strengthen plaintiff's case, and, agreeing with the principal sudder ameen in his reasons for dismissing it, we dismiss this appeal likewise, with costs on appellant.

THE 14TH MARCH 1859.

C. B. TREVOR, ESQ., Judge, and H. V. BAYLEY, ESQ., Officiating Judge.

Petition No. 1217 of 1858.

Application for the admission of a Special Appeal from the decision of Mr. E. Jenkins, Additional Judge of Tirhoot, dated 22nd April 1858, reversing that of Mr. E. DaCosta, Principal Sudder Ameen of that district, dated 4th August 1855, in the case of

Gopaul Singh, Plaintiff,

versus

Bheekunlal and others, Defendants, Petitioners.

*Baboo Ramapersad Roy and Kishenkishore Ghose, for Petitioners.
Baboo Unnodapersad Banerjee, for the Opposite Party.*

Held, that plaintiff, suing for 10½ annas of a property and averring possession of 6½, can only sue for 4 annas.

Held, that when parties agreed to a decision according to the Mithila law, the specific authorities of that law, and not those of the Mitakshara, should be cited to support a bywustha.

Held, that as the Hindoo law only contemplates the illegality of a father's alienation without a son's consent, in certain cases, a suit by a nephew against his uncle's alienation was wrong; and further was not referred to in the bywustha relied on.

Held, that the judge's dictum, that a deed must always speak for itself, was incorrect, and that in many cases its terms are to be interpreted by the surrounding circumstances of the case.

IT is hereby certified that the said application is granted on the following grounds.

Plaintiff, alleging that his father and uncle had illegally alienated certain ancestral property to his prejudice, by two sales, sued to set aside those sales, and for possession of so much of the property as was not in his possession. He averred that the property was 10½ annas of mouzah Panopore Sithothan, pergunnah Besuah, zillah Tirhoot, of which he, plaintiff, still held 6½ annas, and had been dispossessed of the rest.

The principal sudder ameen put in issue, whether the alleged alienation was, according to Hindoo law in that district, valid or not? The principal sudder ameen held, that the sales were necessarily made by the father and uncle in consequence of the "hardness of the times" and in payment of debts. The principal sudder ameen then states, "as regards possession, the plaintiff's plea, of being in possession of 6½ annas of the 10½ annas sold to the defendant, is wholly unfounded."

On appeal to the judge, he, on the 5th March 1857 (Zillah Decisions, pages 19 and 20), held that the sale was valid by Hindoo law: and the purchase was confirmed by him. The judge cited page 312, Vol. II. of Macnaghten's work.

On special appeal by plaintiff to the Sudder Dewanny Adawlut, the case was remanded on the 23rd October 1857, page 1506, with this order: "The judge, in confirming the decision of the lower court against plaintiff, has applied a precedent cited in Macnaghten's *Hindoo Law*, Vol. II. page 312, and decided this case with reference to the doctrine therein laid down. It is urged in special appeal that the case in question is a Bengal case, and, consequently, of no authority in the present one, which is in Tirhoot, within the province

of Behar. We admit the plea and remand the case, in order that it may be tried according to the law and precedents in force in Behar."

The zillah judge on this asked the provincial pundit at Patna, "whether a *father* in zillah Tirhoot can, under any circumstances, alienate any portion of ancestral property, according to the Hindoo law." The pundit replied, "that a *father* could do so in case of a famine, for the maintenance of his family, for ancestral and funeral debts, his own or his children's marriage, and debts incurred for religious acts." The judge states: "the pundit adds, this opinion is according to the Hindoo law current in Mithila, zillah Tirhoot, province Behar, and the Mitakshara. The pundit then cites two authorities, both from the Mitakshara." The judge then held that the deeds did not disclose the necessity required by Hindoo law. He at the same time remarked that the deed "must speak for itself, and from it nothing can be gathered to support in any way defendant's assertions." The judge therefore decreed the appeal of plaintiff.

Defendant appeals specially to this Court, urging :

I. That, when plaintiff alleged possession of $6\frac{1}{2}$ annas, and the principal sudder ameen held such allegation totally unfounded, and the judge has not adjudicated the point, plaintiff's suit for the reversal of the sale of the $6\frac{1}{2}$ annas must be dismissed; or the judge's decision stand as it is.

II. That the pundit should have given his bywustha according to the Mithila law, as current in the locality where the property was situated, and have supported it by the authorities of that law, and not by those of the Mitakshara.

III. That the plaintiff, as nephew, could not sue to set aside his uncle's alienation, as the Hindoo law only contemplates the illegality of a father's alienation in a case like this : and that the bywustha is incomplete and erroneous—incomplete, as the question to which it replied did not include the legality of the uncle's alienation—and erroneous, as it has in this case admitted the validity of a sale made both by the uncle and the father.

On the *first* point we consider the judge's decision clearly wrong : for, if the plaintiff's plea of possession of the $6\frac{1}{2}$ annas is proved to be groundless, his claim, so far as is founded upon that possession, can at most be for the 4 annas, and not for the $10\frac{1}{2}$.

On the *second* point we think that the pundit, when, as it is admitted by both parties before us, the Mithila law was to govern the case, should have supported his opinion by the books acknowledged as authorities by that law, such as the *Vivad Rutnakur*, *Vivad Chintamunee*, *Vyavahar Chintamunee*, the *Smritisar*, and other Mithila works, (*vide* Macnaghten's Preface, page 22,) and not as he has by citations from the Mitakshara. It has been pressed on us, on the other hand, that the Mitakshara is of equal weight with

the Mithila law books ; but, we think, where the special Mithila law is clearly contemplated by the Court and the parties as governing the case, and that law has its own authorities, though they may happen to agree with the Mitakshara, they should be cited and acted on. Further, it has still more strongly been urged, that the decision in Vol. II. Select Reports, Sudder Dewanny Adawlut, 28th July 1813, page 74, and that in Vol. VI. page 132, referring to the case in page 71 of Vol. VI., show that by the Hindoo law current in the same district of Tirhoot, such alienations as this are valid. Without going into the details of the cases, we think it enough to remark that, to the east of the Gunduck, in one part of zillah Tirhoot, the special Mithila law prevails, and in that part to the west, another law, viz. the Mitakshara ; and, in fact, if we required more, to show the erroneous and incomplete nature of the bywustha in that case, it is to be found in the fact that a copy of a bywustha by the same pundit, filed in this case, shows he has applied the penal Mithila law, and held, that under it alienations by a father cannot be made without the son's consent.

On the *third* point the pleadings and the judgment of the judge clearly show, that the plaintiff sued partly as son and partly as nephew, to set aside his father's and uncle's alienation, and that the uncle's alienation was not even referred to in the bywustha.

We would further remark that the judge is in error in writing that a deed must always speak for itself. Its terms may and should, in many cases, be interpreted and explained by the surrounding circumstances of the case.

We remand the case to the judge, to re-try it with reference to the foregoing remarks.

THE 16TH MARCH 1859.

H. T. RAIKES and J. H. PATTON, ESQs., Judges, and G. LOCH, ESQ.,
Officiating Judge.

Case No. 603 of 1856.

*Regular Appeal from the decision of Baboo Gobindchunder Chowdree, Principal Sudder Ameen of Moorshedabad, dated 25th August 1856.*Jeenarain Bose and others, (Plaintiffs,) *Appellants,*
*versus*Rao Moheshnarain Rai and others, (Defendants,) *Respondents.*
Baboos Ramapersad Roy and Kishenkishore Ghose, for Appel-
*lants.**Mr. R. T. Allan and Baboos Shumbhoonath Pundit and Unnodap-*
ersad Banerjee, for Respondents.

Suit laid at Company's Rupees 23,608-2.

THIS was a suit for the possession of alluvial land under Regulation XI. of 1825, involving a boundary dispute. The plaintiffs, as hereditary proprietors of turuf Shekalipore, brought this action on the 26th December 1854, corresponding with 12th Pous 1261 B.S., to recover possession of 8000 beegahs as an accretion to their estate, by reversal of an award under Act IV. of 1840 and the proceedings had under it. The allegation in the plaint is, that turuf Baghdanga, &c., in pergunnah Chandpore, bounded the plaintiffs' estate to the north, and that the river Pudda, coming from the west and running along to the north of Baghdanga, cut away the lands southward of it, till it reached the deara Nerinderpore, the property of the plaintiffs, and the defendants' villages of Dullubpore, Dabeenuggur, and Raneenuggur, situated to the south of the plaintiffs' zemindaree; that this encroachment of the river was gradual, but that accretions began to form in 1233; that plaintiffs took possession of the newly formed chur, but that a suit under Regulation II. of 1819 was brought by Government against Anundochundro Bose, ancestor of plaintiffs, and the assistant collector deputed to measure the land and prepare a map; that by this enquiry, which was made in February 1834, it was discovered that the land measured fell short of the quantity of land embraced in the plaintiffs' original *ruqba*, whereupon, on the 6th of May 1834, the suit of Government was dismissed, it being also ascertained, plaintiffs assert, that the land claimed belonged to their zemindaree; that, subsequently, certain lands noted in the measurement *chittas* and the map aforesaid were again washed away in 1245 and re-formed in 1247; that on the new formation, a Mr. Hodgson, who had taken a farming lease of the land from plaintiffs, sowed indigo, which was forcibly cut and appropriated by Rao Ramsunkur Rai, father of the

In a suit for possession of alluvion, which boundaries were disputed, part of the ground was identified with former revenue measurements, and various proved to have been all along in defendants' possession. That the statute limitations applied; and that accretions upon it, therefore plaintiffs could have no claim.

defendant Moheshnarain ; that legal proceedings were adopted by Hodgson, which issued in the land remaining in his own possession ; that on the remonstrances of Rao Ramsunkur Rai, the deputy magistrate was ordered to make a local investigation ; that he measured the land from north to south, embracing a distance of 102 russees from the borders of Dullubpore, defendants' zemindaree, to those of Chandpore, and then across the edge of the river ; that the defendants laid claim to newly formed land as an accretion to their estate of Dabeenuggur, and that an Act IV. suit was the consequence, which issued in an award for the possession of 227 beegahs, out of 231 measured, in favor of Rao Ramsunkur Rai, by the principal sudder ameen, acting in the capacity of magistrate ; that that award was set aside by the session judge on the appeal of the plaintiffs, who affirm that they got possession in consequence ; that subsequently, on the 10th June 1848, a charge of plunder of grain crops was brought against the plaintiffs by the defendants, through the instrumentality of their ryots, which was dismissed on the 5th September following ; that the defendants in Srawun 1253 again claimed some 6000 beegahs of chur land ; that on the 30th April 1849 the magistrate decided the case in their favor under Act IV. of 1840, and that the order was confirmed in appeal by the session judge on the 25th July following ; and that under cover of the above order the defendants have held possession of the 6000 beegahs *plus* 2000 beegahs more, which have since accreted thereto.

The defendants, in reply, repudiate the plaintiffs' alleged possession on the date specified in the plaint, and refer to a petition presented by them to the commissioner of the division, dated the 28th December 1842, corresponding with 14th Pous 1249, in which they admit that the lands alluviated previous to that date were in the possession of Rao Ramsunkur Rai. They further aver that a suit under Regulation II. of 1819 was instituted, and enquiries made by the deputy collector in person, from which it appeared that 3330 beegahs 7 cottahs had accreted since 1834 (1241), and that Rao Ramsunkur Rai and Doola Debea held possession. They plead that the Act IV. decision shows that they were in possession, and that, as the date of plaintiffs' suit is 26th December 1854 (12th Pous 1261), twenty-one years after formation of the accretion, it is barred by the operation of the statute of limitations. They furthermore mention alluvial formations belong to their estates Dullubpore, Dabeenuggur, &c., and not to the plaintiffs' zemindaree.

The principal sudder ameen has dismissed the suit, partly on the ground of limitation and partly because he considered plaintiffs' proofs insufficient to support their claim.

It appears from the pleadings and evidence laid before us, that there have been frequent disputes between the present parties for the alluvial lands since their first accretion. The first dispute on record

occurred so far back as 1842. It appears that certain accretions formed under the plaintiffs' village of Nerinderpore, for the resumption of which a suit was instituted under Regulation II. of 1819 in 1834. The assistant collector, Mr. Leycester, was deputed to make a local enquiry, and he, on the 6th February 1834, measured the lands, having an area of 2789 beegahs, and prepared a map. As it was found that the ruqba of the plaintiffs' zemindaree had been considerably diminished by diluvion, these lands were considered to be only a part restoration of the lands which had been destroyed, and they were given up to the plaintiffs, and the resumption suit was struck off. In 1842 disputes for these lands took place between the present litigants, and on the 7th July 1842 an award under Act IV. of 1840 was passed by the magistrate in favor of the plaintiffs; but as objections continued to be made, the deputy magistrate, Baboo Chundermohun Chatterjea, was deputed to measure the lands defined by Mr. Leycester and to give possession to the plaintiffs. This he did on the 28th May 1844. In 1845 disputes arose about the possession of a fresh accretion made to the north-east end of the *chur* measured by Mr. Leycester, and which, for the sake of distinction, may be called *chur Nerinderpore*, and comprised about 231 beegahs, which were decreed by the principal sudder ameen, in his capacity of magistrate, in favor of the defendants, on the 2nd May 1845. Appeals were preferred to the session judge, and, ultimately, on the 26th January 1848, the award of the principal sudder ameen was set aside and possession given to the plaintiffs. On orders being issued to carry out the award of the session judge, the defendants filed a petition, complaining that the plaintiffs, under cover of the award, which only assigned possession of 231 beegahs, were appropriating the alluvial lands under the defendants' villages of Dullubpore, &c. The magistrate refused to interfere; but, on application to the judge, he, on the 20th June 1848, ruled that his award could cover only the area in dispute, *viz.* 231 beegahs, and under that award the plaintiffs were not authorised to obtain possession of a larger area. Complaints were subsequently filed in the magistrate's court by the defendants' ryots, that their crops were being plundered by the plaintiffs' people; but the decision of the joint-magistrate, dated the 5th September 1848, shows, as it is alleged, that these charges were unfounded, and that the land belonged to the plaintiffs. In 1849 plaintiffs brought a further suit under Act IV. of 1840, for the possession of the *chur* lands under Dullubpore, &c., which, as averred by the defendants, they had tried to get possession of in executing the award of the 26th January 1848; but the suit was dismissed, and the possession of the defendants in these lands upheld by the magistrate's order of the 30th April 1849, confirmed by the session judge on the 25th July following. Two suits were subsequently instituted

by the respective parties to set aside the awards under Act IV. of 1840, which were adverse to each. One, No. 33, was brought by the defendants to recover possession of 123 beegahs awarded to the plaintiffs under the decision of the 26th January 1848, and of other lands lying, as alleged, to the southward of the Nerinderpore chur measured by Mr. Leycester. A decree, reversing the decision under Act IV. was passed, and possession of the 231 beegahs was assigned to the defendants : but their claim to the other lands was rejected, as the court held that these formed a part of the Nerinderpore chur, and on appeal this order was confirmed. The other case, No. 55, is that before us. It was instituted by the plaintiffs to set aside the Act IV. decisions of April and July 1849, and to recover possession of the chur lands alleged by defendants to belong to their Dullubpore and other villages, the area of which exceeded 8000 beegahs.

In answer to the plaintiffs' claim, the defendants pleaded limitation, and this plea, as regards the larger portion of the chur still in existence, has been admitted as valid by the principal sudder ameen, who also holds that the claim for the remainder is not proved, and he has, therefore, dismissed the plaintiffs' suit.

It appears that in 1842 a petition was presented by the plaintiffs to the commissioner, stating that large accretions had been made to their Nerinderpore chur ; that these new formations were in the possession of the defendants ; that the lands were liable to resumption, and they prayed for the settlement. Mr. Deputy Collector Brown was deputed to measure the lands, and his measurement gave the area at beegahs 2789-1-19 ; and since that period large accessions were supposed to have been made, increasing the area of the lands claimed in the present suit to more than 8000 beegahs. The principal sudder ameen deputed his nazir to the spot. He was able to trace Mr. Brown's measurement with the assistance of the chittas obtained from the collector's office. He found that, since the institution of the suit, great diluvion had occurred ; that of the disputed area there were only 3356 beegahs in existence, of which beegahs 2789-1-19 had been measured by Mr. Brown, and the remaining 477 beegahs were an accretion since that period. The petition of the plaintiffs to the commissioner, which they repudiate, but which we see no reason to reject, as not having been presented with their sanction, shows that the defendants were in possession of the contested chur lands in 1842 (1249). The chittas of Mr. Deputy Collector Brown also show that these lands were measured early in 1843 (1249), as in the possession of the defendants, and the chitta is signed by the agent of the plaintiffs, who was present at the local enquiry : and a subsequent measurement in 1845 (1252), conducted by Baboo Govindpersad Sen, show the lands to be still in the possession of the defendants ; and no proof whatever has been adduced by the plaintiffs to show that

they ever got possession subsequent to 1842 (1249). Indeed, the plaintiffs admit indirectly that they were not within time, for they plead Regulation II. of 1805, as enabling them to bring their present suit, a law by no means applicable, and which the counsel for the appellants have wisely abandoned. It may also be observed that, considering the long course of litigation between the parties from 1842 to 1849, it is singular that the plaintiffs should have slept over their rights so long after the decision under Act IV. passed in April of that year, and should not have attempted to enforce them for five years. Under the circumstances above detailed, we think that the principal sudder ameen has rightly ruled that the statute of limitations is applicable to that part of the chur measured by Mr. Deputy Collector Brown; and as the plaintiffs' claim to that is barred, they can of course have no right to the accretions attached thereto. We think it unnecessary to enter into any of the minor pleas urged by the plaintiffs, and, confirming the order of the lower court, we dismiss the appeal, with costs.

THE 16TH MARCH 1859.

H. T. RAIKES and J. H. PATTON, Esqs., Judges, and G. LOCH, Esq.,
Officiating Judge.

Case No. 300 of 1858.

Special Appeal from the decision of Mr. A. Davidson, Principal Sudder Ameen of Midnapore, dated 18th November 1857, affirming a decree of Moulvee Durasutoolah, Moonsiff of Bugoorah, dated 24th March 1856.

Soondernarain Mytee and others, (Plaintiffs,) *Appellants,*
versus

Chowdree Ukhoyanarain Dass Mohapattur and others, (Defendants,)
Respondents.

Baboo Jugudanund Mookerjee, for Appellants, Ex-parte.

THIS case was admitted to special appeal on the 5th May 1858, under the following certificate recorded by Messrs. J. H. Patton and A. Sconce.

"This suit was instituted by Soondernarain and three others, sons of one Judoonath, to recover a 6-anna share of two villages, on the ground that during their minority the property had been transferred to the management of one Chowdree Ukhoyanarain Dass in 1257. In answer to this claim, defendant, Ukhoyanarain Dass, stated that, on 29th Cheyt 1250, with the consent of Naroochurn and Kaleechurn, his uncles, and Ukhoyanarain Mytee, his cousin, Soondernarain, one of the plaintiffs, sold a 9-anna share of the villages for the payment of his father's debts, and for the maintenance of his brothers.

Case remanded for decision upon the pleas raised, not on a question of fraud, not put forward as invalidating the sale.

"The first court held the sale to be proved, and dismissed the suit. On appeal the principal sudder ameen declared the sale to have been fictitious to save the property from the plaintiffs' creditors, and by this fact held plaintiffs' claim to be estopped.

"The ground of special appeal is, that no issue upon the point of creditors was taken in the case, and that by the act of Soonder-narain only the rights of his three brothers could not be prejudiced. We admit the special appeal to try that point."

JUDGMENT.

The plea, that no allegation of fraud was made by either party, appears to be well founded, and the principal sudder ameen has therefore declared the invalidity of the sale on grounds which have not been placed on record before him.

We remand the case, that he may decide the question of the sale having been made or not as pleaded; and should he hold that fact proved, he will also determine whether such sale, by the brother who had reached majority, can be binding on the shares of the two younger ones, admitted to have been minors at that time.

THE 16TH MARCH 1859.

H. T. RAIKES and J. H. PATTON, ESQS., Judges, and G. LOCH, ESQ.,
Officiating Judge.

Case No. 402 of 1858.

Special Appeal from the decision of Moulvee Ameerooddeen Khan, Additional Principal Sudder Ameen of Chittagong, dated 26th December 1857, affirming a decree of Baboo Moheshchunder Sein, Moonsiff of Sundeeep, dated 19th August 1856.

Ellaheebuksh Chowdree, (one of the Defendants,) *Appellant*,
versus

Mahomed Kaem and others, (Plaintiffs,) and Shumboo Bewah and others, (Defendants,) *Respondents*.

Baboo Kishensukha Mookerjee, for Appellant.

Moulvee Mahomed Ismael, for Respondents.

When a summons for the attendance of the petitioner, defendant in the suit, was issued under the provisions of Section XXIV. Act XIX. of 1853, and he concealed himself, so that the summons could not be personally served, and afterwards filed a petition in the lower court, stating that he was aware of the issue of the summons, but could not, without disgracing himself, appear to give evidence in so trifling a matter; held that, under the circumstances, the moonsiff acted properly in disposing of the suit *ex-parte*.

THIS case was admitted to special appeal on the 29th June 1858, under the following certificate recorded by Messrs. C. B. Trevor and G. Loch.

"The petitioner was defendant, appellant, below. One Summo sued the plaintiff in this suit summarily on a kuboolyut for

an arrear of rent, and obtained a decree. The plaintiff then sued Summo and the petitioner for the reversal of the summary decree, and for damages measured at twice the value of the property sold in execution of the summary decree, on the ground that the petitioner had instigated the plaintiff in the summary suit to bring that unjust action. The moonsiff summoned the petitioner under Section XXIV. of Act XIX. of 1853. The summons was not personally served. As however defendant did not appear, the moonsiff investigated the case *ex-parte* and gave a decree to the plaintiff against both defendants. On appeal by the petitioner before the court, the principal sudder ameen confirmed the decision of the court below.

"Petitioner now appeals specially, urging: 1st, that the present suit as against him cannot be heard, it being a suit to contest the justice of a summary award to which he was not a party; and, 2nd, that if it can, as the summons was not personally served on him, the case should have been heard after a perusal by the court of the evidence, both documentary and oral, filed by him.

"We have no doubt of the soundness of the rule laid down in the case of Kishen Comul Singh *versus* Ramdhee Mundil (Decisions of 1851, page 154), to the effect that, when a regular suit is laid *expressly* and *exclusively* to contest the justice of a summary award passed on a summary suit for rent, the issue between the parties before the collector can alone be tried in the civil court. We think, however, that when, as in the present case, not only the reversal of that decision, but damages against a third party, is sued for, on the ground of guilty instigation to an act alleged to be fraudulent, the suit is enlarged, and the case can be tried upon the issues arising out of the pleadings. We have, therefore, no hesitation in giving the first point urged in special appeal against petitioner. On the second point advanced by him, we are of opinion that, as the summons was not served personally on him, as is required by Section XXIV. of Act XIX. of 1853, the court should, before it thought the case might be heard without his evidence, have looked to the documentary or oral evidence filed by him, and not have decided the case *ex-parte*; but having done so, we think that the decisions of the lower courts are at present defective. We, therefore, admit the special appeal, to try whether, under the foregoing circumstances, the suit should not be remitted to the court of first instance for re-investigation."

JUDGMENT.

It appears that the summons was issued against the petitioner. He however concealed himself, so that the summons could not be personally served. After the return to the summons had been made, the petitioner filed a petition before the moonsiff,

stating that he was aware that a summons had been issued for his attendance, but as the suit was of so trifling a nature, he considered it would disgrace him to attend the court on such an occasion. The moonsiff then took up the case and decided it *ex-parte*, and this order was confirmed by the principal sudder ameen. As regards the plea urged by petitioner, that the summons was not personally served, and therefore the suit should not have been tried *ex-parte*, but after examination of the evidence filed by both parties, we think that the requisitions of the law, *viz.* to give petitioner notice that his attendance was required, were sufficiently complied with ; and we consider that, after the contempt of court exhibited by the petitioner, he was entitled to no indulgence, and that the moonsiff acted rightly in enforcing the penalty prescribed by the law. We dismiss the appeal, with costs.

THE 16TH MARCH 1859.

A. SCONCE and C. B. TREVOR, ESQS., Judges, and H. V. BAYLEY, ESQ.,
Officiating Judge.

No. 627 of 1856.

Regular Appeal from the decision of Mirza Mahomed Sadeeq Khan, Principal Sudder Ameen of Sarun, dated 6th August 1856.

Musst. Khedun Kooar, mother and guardian of the minor sons of the deceased plaintiff, Busdeonarain Singh, *Appellant*,

versus

Muhabil Singh and others, (Defendants,) *Respondents*.

Moulvee Syud Murhumut Hossein, for Appellant, Ex-parte.

Suit laid at Company's Rupees 13,053-5-4.

Suit brought to set aside two zur-i-peshgee leases in so far as they covered plaintiff's share of certain property, the ground of action being the incompetency of the lessor, plaintiff's elder brother, to make the leases during plaintiff's minority.

THIS suit was brought by Busdeonarain Singh, the youngest of the three sons of Thakoornarain Singh, to set aside two zur-i-peshgee leases executed by his eldest brother, Burhumdeonarain Singh, during his minority, with respect to his share of the paternal estate. The first of the deeds referred to was executed by Burhumdeonarain in favor of Muhabil Singh, on 25th Assin 1239 ; the second in favor of Deokurun Tewaree, on the 12th September 1832 (1240 Fuslee), also by Burhumdeo, but purporting to be on his own behalf and on behalf of his minor brothers, Butookdeonarain and the plaintiff Busdeonarain. And accordingly plaintiff, declaring that he did not

Held, that as more than twelve years had elapsed from the date of plaintiff's majority before the suit was brought, and plaintiff in the plaint admitted his knowledge of the leases and of his brother's acts from the time of his majority, the action is barred by lapse of time.

come of age till 1242, that is, two years subsequent to the latest lease, instituted this action to recover possession of his share of his father's property, as comprised within both leases, on the ground that his brother Burhumdeonarain exceeded his legal authority in creating the leases referred to. The principal sudder ameen has held plaintiff's claim to be barred by the law of limitation ; and upon that point only this appeal comes before us.

Plaintiff Busdeonarain became of age, as he himself stated, in 1242. This suit was brought on the 14th May 1853 (or 1260), that is, eighteen years beyond plaintiff's majority ; and the principal sudder ameen was of opinion, that plaintiff, if he thought fit to contest the acts done by his brother during his minority, was bound to sue within twelve years of the period of his majority. For appellant it is contended that the zur-i-peshgee leases which form the subject matter of the contest, being of the nature of mortgages, the law of limitation cannot be pleaded as a bar to plaintiff's action. But plaintiff, appellant, fails to distinguish the ground taken by the lower court. In this case, the nature of the mortgages, as such, is not in question. We have no issue raised as to the redemption of the leases or of the right of plaintiff to re-enter upon the ground of repayment of the original advance. There is no room whatever for the application of the law of mortgage. The sole cause of action is assumed to be the incompetency of the plaintiff's eldest brother, Burhumdeonarain, to assign his minor brother's share during his minority ; and as it is expressly stated in the plaint, that plaintiff, cognizant of the existence of the leases and of his brother's acts, from the very beginning of his majority, repeatedly desired the lessees to restore to him his share of the property, we are clearly of opinion that the plaintiff's delay to sue for twelve years from the date of his majority puts him out of court. Plaintiff's silence for twelve years deprives him of the right to contest an act which does not involve the question of mortgage, but the question of power ; and he must be held to have virtually affirmed a power which he so long failed to make the subject of judicial determination. Appeal dismissed.

THE 16TH MARCH 1859.

A. SCONCE and C. B. TREVOR, ESQS., Judges, and H. V. BAYLEY, ESQ.,
Officiating Judge.

*Regular Appeals from the decision of Moonshee Naziroodeen
Mahomed, Principal Sudder Ameen of Behar, dated 22nd
April 1857.*

Case No. 609 of 1857.

Yusuf Alee Khan, (Plaintiff,) *Appellant*,
versus

Teepoo Khan, (Defendant,) *Respondent*.

Suit laid at Company's Rupees 22,608-0-6.

Case No. 610 of 1857.

Yusuf Alee Khan, (Defendant), *Appellant*,
versus

Teepoo Khan, (Plaintiff,) *Respondent*.

Suit laid at Company's Rupees 10,193-14-6.

*Moonshee Ameer Alee and Moulvee Murhumut Hossein, for
Appellants.*

*Baboo Shumbhoonath Pundit and Mr. G. S. Fagan, for Re-
spondent.*

IN case No. 609 Teepoo Khan, the alleged purchaser of a 4-anna 18-dam 13-krant share in talook Nunkur Debee Mubhanee, sued for declaration of possession and registration of his name in lieu of that of Roshun Khan, his alleged vendor. He based his claim on a deed of sale, dated the 12th November 1852, or 16th Kartik 1260. This suit was brought on the 3rd March 1854.

To this plaint the defendant, Roshun Khan, answered, admitting the actual execution of the deed of sale, and plaintiff's possession and payment of the Government revenue for two years, but pleaded that he had never received the consideration money, which was stated by plaintiff to have been duly made over to him.

In case No. 610 Roshun Khan as plaintiff sued for the recovery of the consideration money. This suit was brought on the 3rd May 1854.

Teepoo Khan, as defendant in this last suit, answered that the consideration money had been duly paid. Both parties admit that the sum of it was rs. 19,100.

The principal sudder ameen has held, on the evidence before him, and the probabilities of the case, that the consideration money was duly paid, and has therefore decreed the suit of Teepoo Khan, plaintiff, No. 609, for declaration of possession and registration, and dismissed that of Roshun Khan, plaintiff in No. 610, for the recovery of the consideration money.

The presumption from the admitted execution of the deed, and from plaintiff's possession for two years under it, being that the recital in the deed of the passing of consideration was correct, till the contrary should be shown; held, that the burden of proof of no consideration was on defendant.

Held, on the evidence and probabilities, that the consideration did pass.

Appeal dismissed.

Roshun Khan's heir, Yusuf Alee Khan, appeals to this Court, and, in regard to both decisions of the principal sudder ameen, relies on the evidence on the record to satisfy us that the principal sudder ameen's decisions are wrong. The appellant's pleader proceeded to read the defendant's evidence and to comment upon it, when the Court, on the objection of the respondent's pleader, ruled that the presumption from the admitted execution of the deed, which recited that the consideration money had been paid, and from plaintiff's possession under it for two years, which defendant had attempted to explain only by the plea that he had not had time to interfere in regard to it, owing to the death of his son, was so strong in favor of plaintiff's case, that it was for the appellant first to prove from his own evidence his statement that no consideration passed. The Court, having then heard appellant's evidence, consider it to consist of vague negative statements, not supported by any circumstances showing that the witnesses were in such a position as to be naturally able to know the fact to which they were deposing. The evidence of the writer of the deed, Meer Ashruf Alee, who was also nominated as the agent to register the deed, supports the respondent's case, and leads to the conclusion that the appellant had received the consideration money.

There is also the strongest improbability that appellant would have allowed respondent to remain in possession for two years and pay the Government revenue for that period, if that possession was held under a deed and by a transaction in which appellant was entirely defrauded of his property. It is further to be remarked that plaintiff never brought his suit, on the ground of not having received the consideration money, till two months after the date of the suit of plaintiff, for confirmation of his possession by registration in the collectorate.

Considering then that the appellant has failed to rebut the direct evidence and strong presumptions on the record, in which appellant was defendant, we dismiss his appeal, with costs on appellant. The appeal in the second case, in which appellant was plaintiff, follows, and is also dismissed accordingly, with costs.

THE 16TH MARCH 1859.

H. T. RAIKES and J. H. PATTON, Esqs., Judges, and G. LOCH, Esq.,
Officiating Judge.

Case No. 546 of 1858.

Special Appeal from the decision of Mr. F. B. Kemp, Judge of Backergunge, dated 22nd January 1858, affirming a decree of Baboo Ramcoomar Roy, Moonsiff of Cowkhally, dated 15th December 1856.

Bhugwanchunder Goohoo, (Defendant,) *Appellant,*
versus

Ramsebuk Somurdar, (Plaintiff,) *Respondent.*

Baboo Unookoolchunder Mookerjee, for Appellant.

Baboos Shumbhoonath Pundit and Sreenath Doss, for Respondent.

THIS case was admitted to special appeal on the 2nd September 1858, under the following certificate recorded by Messrs. C. B. Trevor and H. V. Bayley.

In a summary suit for rent, where the name of the defaulting ryot was incorrectly given, but the notices prescribed by law were duly served; it was held that, in the absence of any fraud, the misnomer was insufficient to vitiate the proceedings before the collector.

"Petitioner sued a tenant of his, named Ramsebuk, under the name of Ramkissub, for arrears of rent. The usual processes were in the latter name, and eventually the case was decided *ex-parte*. Ramsebuk as plaintiff now sues to have the summary decree and sale of his tenure made in execution of it set aside, on the ground that the suit was in a wrong name and the processes required by law were not duly served. The lower court, on the ground of the error in the name, which is not denied, decreed plaintiff's suit, reversing the summary proceedings.

"The defendant, appellant below, now appeals specially, urging that the mere error in the name of the party sued is not sufficient of itself to vitiate all the proceedings; that the suit was a summary one chiefly against the land, a real action in fact, and the tenant's name was in such a case not of the material importance which it would have been had the action been a personal one; that the processes were duly served on the house of Ramsebuk; and that he was perfectly cognizant of the case, and the tenure upon which the suit had accrued was mentioned; that consequently the case should be remanded for investigation on the merits, in other words, to try whether the processes had been rightly served or not.

"We admit the special appeal, to try whether, under the circumstances of the case, the courts were right in holding that the false description of the party sued, in the plaint and the processes, was *alone* sufficient to vitiate all the proceedings in the summary suit or not."

JUDGMENT.

In his decision the moonsiff states, that not only the name of the tenant in the summary suit was incorrectly given, but also that

of his father, and that neither the name of the village nor of the kismut in which the tenure is situated is mentioned. On referring however to the summary plaint filed before the collector, we find the name of the tenure and of the pergunnah; we also find the name of the plaintiff Ramkissub associated with that of a partner, Mohesh Chunder; and though the name of the former be incorrectly stated, no such objection is raised as regards the latter; nor do we find in the summary plaint, nor has it been shown us elsewhere in the record, that the defendant zemindar has given the name of the plaintiff's father incorrectly. As the judge does not find that any fraud was intended or practised, we think that, if the notices prescribed by law were duly served by the collector, and the plaintiff was thus made aware of the institution of a claim for rent against him, the misnomer is not sufficient of itself to vitiate the summary proceedings. We therefore remand the case, to be tried with reference to the above remarks.

THE 21ST MARCH 1859.

C. B. TREVOR, ESQ., Judge, and H. V. BAYLEY, ESQ., Officiating Judge.

Petition No. 1755 of 1858.

Application for Special Appeal from the decision of Mr. H. C. Metcalfe, Judge of Tipperah, dated 9th July 1858, affirming that of Baboo Dwarkanath Roy, Principal Sudder Ameen of that district, dated 2nd March 1858, in the case of

Maharajah Ishanchunder Manik, Plaintiff,

versus

Nujeebunnissa, Defendant, Petitioner.

Baboo Unookoolchunder Mookerjee and Moonshee Ameer Alee, for Petitioner.

Baboo Unnodapersad Banerjee and Mr. R. T. Allan, for the Opposite Party.

IT is hereby certified that the said application is granted on the following grounds.

The special appellant (defendant) urges in this case that the judge has wrongly treated the suit as one for resumption, whereas the case is for possession of land, which plaintiff claims as his rent-paying estate, and the defendant as his rent-free estate; and that the valuation, at eighteen times the usual value, shows plaintiff to have sued for resumption.

On the other hand, it is pleaded that the suit was valued in that manner merely by way of precaution, and is really a suit for the possession of the land wrongfully held by the defendant.

Case remanded, the question at issue not being one of resumption, and the judge having misapplied the precedents cited. The case was to be tried as one of ordinary boundary dispute.

On a reference to the judgment of the judge, affirming that of the principal sudder ameen, we find that the judge has, to all intents and purposes, tried the suit as one for resumption, and adjudicated it on the invalidity of the title of defendant to hold rent free ; whereas it is clear from the pleadings, and is admitted by the respondent, that such was not the question at issue. We further observe that the judge has gone beyond the ruling of this Court in regard to possession before the 1st December 1790. The rulings in the cases of Gungadhur Banerjee, Kenaram Rai, and Degumber Mitter, were to the effect that *prima facie* proof of possession of the land as rent-free, before the 1st December 1790, was to be shown, in order to admit a party to plead the statute of limitations against a zemindar suing to resume rent-free land under an allegation that it was held under an invalid title. It is erroneous, under these precedents and the practice of the Court, to test the validity of every alleged rent-free title as on the issue of whether it existed on the 1st December 1790.

We remand the case to the judge, for re-trial with reference to the above remarks, that is, he may re-try it as an ordinary boundary dispute between two zemindars.

THE 21ST MARCH 1859.

C.B. TREVOR, ESQ., Judge, and H.V. BAYLEY, ESQ., Officiating Judge.

Petition No. 1760 of 1858.

Application for Special Appeal from the decision of Mr. H. Atherton, Judge of Sarun, dated 9th September 1858, reversing that of Mirza Mahomed Siddiq Khan, Principal Sudder Ameen of that district, dated 18th March 1858, in the case of

Baboo Bhugwan Lal Sahoo, (Plaintiff,) *Petitioner,*
versus

Rajah Sahib Perlal Sein, (Defendant,) *Opposite Party.*

Baboo Kishenkishore Ghose and Moonshee Abbas Alee Khan,
for Petitioner.

Baboos Dwarkanath Mitter and Unnodapersad Banerjee, for
the Opposite Party.

Held, that although the principal sudder ameen had at first summoned the plaintiff, special appellant, to give evidence, still as he had

It is hereby certified that the said application is granted on the following grounds.

Plaintiff, special appellant, sued Rajah Perlal Sein for the recovery of rs. 2000 principal and 1572-10-6 interest, due under a bond, dated 3rd Assar 1257, executed by Rajah Perlal Sein in favor of the gomastah of plaintiff's kotee.

Defendant admitted the execution of the bond, but pleaded that the sum had been liquidated by being deducted from an amount promised to him by the plaintiff, on account of another transaction in which they were concerned : the above sum was said to be credited in plaintiff's books.

Whilst the case was pending, the defendant, on the 23rd November 1857, made a special application to the principal sudder ameen, under Section VIII. Act XIX. of 1853, for an order for a summons to compel the attendance of the plaintiff to give evidence.

The court, after considering the grounds urged in support of such application, called upon the plaintiff to show cause, under Section VIII. of the Act above cited, why he should not be required to attend and give evidence. The plaintiff showed cause on the 10th December 1857. His pleas for non-attendance were rejected, and a summons was issued for his attendance. The summons was not personally served upon the plaintiff, but the return was to the effect that he could not be found. Eventually the principal sudder ameen, on a re-consideration of his former order requiring the attendance of the plaintiff, was of opinion that, as, on the pleadings in the present case, the burden of the proof of the payment of a sum, alleged to be due under a bond acknowledged by him to be genuine, was on the defendant, the attendance of the plaintiff was not necessary. He then proceeded to enquire into the case on the merits, and gave a decree in the plaintiff's favor.

From this decision the defendant appealed to the judge, urging that, as plaintiff had failed to appear, his case should, under Act XIX. of 1853, have been dismissed. The judge was of opinion that the principal sudder ameen should have enforced his own order, and that this case was one in which it was particularly desirable that the plaintiff should have come forward and submitted to an examination ; and as he did not do so, though summoned, the judge dismissed the plaintiff's claim, with costs.

Plaintiff now appeals specially, urging that, as the principal sudder ameen considered the evidence of plaintiff unnecessary, it was not competent to the judge, simply on the ground that he considered it necessary, to dismiss the plaintiff's claim ; that it is quite competent to the judge, if he thinks the attendance of the plaintiff as a witness necessary, to have him summoned as such ; but in this case the process required by law must be re-issued, and the penalty of dismissal of suit can only follow, after the summons has been personally delivered, and then not complied with.

Whether the principal sudder ameen exercised a sound discretion in excusing the attendance of the plaintiff, may admit of question ; but having excused it, we are quite clear that it was not competent to the judge, simply on the ground that his attendance should have been required, to have dismissed his suit. Moreover, before the

subsequently declared, whether rightly or wrongly, that his attendance was unnecessary, and has given a decree in his favor, it was not competent to the judge, simply on the ground that his attendance should have been required, to have in effect dismissed his suit ; but it is competent to the judge, if he thinks it necessary, to cause the processes to be issued for the attendance of the plaintiff to give evidence before him, and, if the plaintiff fails to attend after those processes have been issued and served in due legal form, he will be liable to have his suit heard *ex-parte* under Section XXIV. of the Act. Case remitted, with directions to the judge to act as suggested by the Court.

penalty of dismissal can be incurred, the forms required by Section XXIV. Act XIX. of 1853, must have been followed. Amongst these is the issue of the summons, and that summons must, as has been ruled by the Court frequently, be personally delivered to the party concerned, a requirement which has not been acted up to in the present case. On these grounds, therefore, the order of the judge cannot in the present form stand. There is no doubt, however, that it is quite competent to the judge, if he thinks it necessary, to cause the processes to be issued for the attendance of the plaintiff to give evidence before him ; and if the plaintiff fails to attend after those processes have been issued and served in due legal form, he will then be liable to have his suit heard *ex-parte* under Section XXIV of the Act. We remit the case to the judge, with directions that, if he thinks the attendance of the plaintiff necessary, he will act as above suggested, and pass whatever order may eventually seem legal and proper.

THE 21ST MARCH 1859.

H. T. RAIKES and J. H. PATTON, ESQS., Judges, and G. LOCH, ESQ.,
Officiating Judge.

*Special Appeals from the decision of Mr. O. W. Malet, Judge
of Beerbhoom, dated 11th August 1857, reversing a decree
of Baboo Peareemohun Banerjee, Principal Sudder Ameen
of that district, dated 12th February 1857.*

Case No. 120 of 1858.

Haradhun Chatterjee and others, (Plaintiffs,) *Appellants,*
versus

Bukronath Mookerjee and others, (Defendants,) *Respondents.*

*Baboo Shumbhoonath Pundit and Kishenkishore Ghose and
Moulvee Lootfur Ruhman, for Lukheenarain Chatterjee,
Appellant.*

*Baboo Ramapersad Roy and Unookoolchunder Mookerjee and
Moonshee Ameer Alee, for Bukronath and others, Respondents.*

*Baboo Kishensukha Mookerjee, for Ramdoollub Chatterjee,
Respondent.*

Case No. 121 of 1858.

Ramdoollub Chatterjee, (Defendant,) *Appellant,*
versus

Soorjeenarain Chatterjee and others, (Plaintiffs,) *Respondents.*

Baboo Kishensukha Mookerjee, for Appellant.

Case No. 122 of 1858.

Bukronath Mookerjee and others, (Defendants,) *Appellants,*
versus

Haradhun Chatterjee and others, (Plaintiffs,) *Respondents.*

Baboo Unookoolchundur Mookerjee, for Appellants.

THESE cases were admitted to special appeal on the 18th February 1858, under the following certificate recorded by Messrs. A Sconce and J. S. Torrens.

"Petitioners' suit, instituted for the recovery of half share of a talook, has been dismissed by the zillah judge, as barred by the law of limitation. Petitioners say that the talook in question was the sole right of their ancestors; that it was leased for the years 1239 to 1254 in consideration of an advance paid; and that the lessees refused to re-admit plaintiffs to the possession of their share.

"Defendants set up the sale of the talook as made by Niranjun in his own behalf and as guardian of the plaintiffs.

"The judge takes plaintiffs' claim to be barred, because, as he infers, they knew, or were bound to know, that, for more than twelve

tute of limitations to their claim. Appeal dismissed; petitioners also were defendants' costs.

Where suit was laid to cancel a deed of sale as a deed never executed, but it was proved that it existed in 1839, and was known to plaintiffs' predecessors as an adverse title against them held by the purchaser, and urged by him then in a court of law, the lower court rightly applied the sta-

years preceding the institution of the suit, defendants had held the talook upon an adverse title, and that plaintiffs, within twelve years from that knowledge, did not prefer this suit. The judge's opinion on this point is determined by two decrees. In the one case, that is a moonsiff's decree of 1st October 1839, the present plaintiffs were not parties; and as the suit was decided by compromise, the judge remarks it may not be deemed conclusive as to the question of knowledge of the present defendant's asserted purchase. The second case, decided by the principal sudder ameen in July 1839, was a suit to recover money advanced, and, in the absence of the present plaintiffs, or those whom they represent, was decreed. But in this case defendants were not formal defendants; they came up as intervenors asserting their interest in the talook. No decision was pronounced upon this claim; but the judge, as already said, considers that plaintiffs must be held to have had notice that the adverse right had been asserted.

"The ground of special appeal is, that limitation does not apply to a deprivation of right originating in a lease of the nature of a mortgage, or, if it does apply, not till the period covered by the lease expires.

"The case appears to be one of some difficulty: and, seeing also that an admission appears to have been made by defendants that the sale made by Nirunjun was so made, in part, as guardian of the plaintiffs, when minors, we admit the special appeal, to try whether the suit is rightly held to be barred.

"Two separate appeals, Nos. 121 and 122, have been preferred by defendants in the suit in consequence of the judge refusing their costs, though the appeal had been decided in their favor. We also admit these applications."

JUDGMENT.

The pleaders of the parties admit that the second point mooted in the certificate regarding the sale by Nirunjun having been made by him, as guardian of the plaintiffs, when minors, does not arise on the record; and that point is accordingly withdrawn.

On the first point, as to whether limitation does apply to a deprivation of right originating in a lease of the nature of a mortgage, or if it does, not until the period covered by the lease expires, we also think that some misapprehension of the facts found by the lower court prevailed when the special appeal application was heard and the appeal admitted.

It is true the estate was mortgaged from 1239 to 1254, and possession held by the mortgagees during the whole period. But the question before the courts below was, whether the mortgagor, now represented by plaintiffs, had in 1245 sold the equity of redemption right for a consideration of rs. 600, to a third party,

who, on expiry of the term of mortgage, paid the balance of the debt, some rs. 96, and assumed possession of the property. The object of the present suit is to recover possession,—the plaintiffs alleging that the equity of redemption was never so conveyed to the third party alluded to, and that the sale is a pretence on the part of the mortgagees, to retain possession of the property through the instrumentality of this person, who has been set up by them as purchaser for the purpose.

As the kubala or deed of sale under which plaintiffs are alleged to have sold the property to the third party is produced by him, the first issue to be determined by the court below was the *factum* of its execution in the year 1245 B. S. As the present action was instituted in 1262, that is, in the *seventeenth* year after it was made, the defendants pleaded limitation, and the judge has held that, as the mortgagors were defendants in a suit brought by one Preeonath Surma, seeking to make the property now in suit liable for their debt to him, for which it had been pledged as security, and the purchaser then intervened, asserting his preferential right in that capacity, there was a legal presumption of knowledge on their part of this deed of sale being in existence, and they were bound to bring any action to dispute it within twelve years; that, consequently, the present action having been delayed until 1262, or long past the limitation period, they were now barred from maintaining such action: and the judge dismissed the claim.

So far then as the facts found below go, there is no finding which justifies the assumption that the law of limitation has been applied below to “a deprivation of right originating in a lease of the nature of a mortgage.” The bill of sale purports to have been granted to a person other than the mortgagees, and to have conveyed the interest still vested in the mortgagors to the purchaser, who then became the owner of the estate subject to mortgage; but the transaction thus described did not partake of a mortgage, so as to be bound by the laws which apply to those conveyances only. The point, as laid in the certificate, does not therefore arise; and the only ground on which the judgment passed is open to question, is, whether the judge was warranted in holding that the *knowledge* of the claim, as set up in 1839 by the purchaser, in the suit then pending, created a cause of action which plaintiffs’ predecessors were bound to act upon within twelve years, or forego their remedy after that period, as barred by the law of limitation.

We have allowed the pleaders to argue the case on this ground. And though appellants’ pleader has urged that the parties before the court in 1839 were all minors, with the exception of one of the brothers, and were sued in the name of their mother as guardian; and that the kubala, though pleaded by the claimant purchaser, was not filed in court, and that there is no evidence or certainty that the

claim then preferred was ever made known to the principals outside ; yet we find that, besides the minor brothers, three brothers who had reached majority, were defendants in the suit of 1839 ; that a clear distinct assertion of the sale and purchase of the property, by written deed, was made by the claimant ; and that the decree records the fact and guards the claimant from any injury to his rights consequent upon the order then passed between the actual parties before the court.

Hence, there was, in our opinion, good and sufficient ground for the judge's presumption that the plaintiffs' predecessors had knowledge of the purchaser's adverse title, and must also have known that he was pressing it on the occasion alluded to, to procure its *recognition* by a court of law. There are other facts also, showing that the purchaser renewed his claim in a more decided form in 1846, which support the belief that plaintiffs ought to have been aware, in 1839, that, whenever they should attempt to take possession of this property, the purchaser was determined to oppose their claim ; and yet the plaintiffs slept over any such assertion of right until 1855, neither attempting to dispute the alleged sale by impeaching the kubala, nor more directly by instituting a suit for recovery of the lands when the term of the mortgage expired in 1255 B. S., and possession was taken by the defendant.

As the present suit was brought to cancel this deed of sale on the allegation of its having never been executed, and the finding of the judge is, that its *existence* as a muniment of title adverse to plaintiffs' predecessors was known to them so far back as 1839, and was then acted upon by the holder, who, subsequently, under cover of it, took possession of the lands apparently without dispute, we see no reason to doubt the correct application of the law by the judge, and dismiss this special appeal, with costs.

Nos. 121 and 122 have been admitted on the point of costs only. The judge, though deciding the appeal in their favor, had made the petitioners pay their own costs. As no satisfactory reasons have been assigned by the judge for this ruling in the matter, we reverse the order regarding costs, and decree the petitioners entitled to receive them from the opposite party.

THE 22ND MARCH 1859.

H. T. RAIKES and J. H. PATTON, ESQs., Judges, and G. LOCH, ESQ.,
Officiating Judge.

Case No. 402 of 1857.

Regular Appeal from the decision of Mr. C. Macdonald, Principal Sudder Ameen of Bhaugulpore, dated 7th February 1857.

Koonjbeharee Lal and others, (Defendants,) *Appellants,*
versus

Rajah Neelanund Singh and others, (Plaintiffs,) *Respondents.*

Baboos Kishenkishore Ghose and Obhoychurn Bose, for Appellants.

Baboo Ramapersad Roy and Moonshee Ameer Alee, for Respondents.

Suit laid at Company's Rupees 9750.

THE plaintiff, Rajah Neelanund Singh, asserts that the former rajahs of Muhalat Khurrukpore, to whose rights he has succeeded in virtue of his purchase at a sale for arrears of Government revenue, constructed a water-course from the river Bilasee, near mouzah Goorgaon, to their pergunnah Khiree, to provide for the proper irrigation of the lands of that pergunnah; that the water-course was consequently named the Rajdhar, and no one had a right to the water from it, and the water-course was kept in repair at the expense of the zemindars of Khurrukpore; that the defendants had cut two small water-courses or singahs from the Rajdhar to irrigate their lands of chuk Ashya; and that in consequence of the water being thereby turned off from the proper channel, the crops of several villages in pergunnah Khiree had suffered, and the present action is brought to reverse an order of the magistrate of Bhaugulpore, dated 15th February 1854, by which the new water-courses made by the defendants were kept open, and to close the said water-courses, and to recover damages for the injury sustained by the village crops.

The defendants deny the special claim to the Rajdhar asserted by the plaintiff. They affirm that it is a natural water-course, that every person through whose lands it runs has a right to the water; that the water-courses from it to their chuk Ashya lands have not been recently dug; that when the lands of chuk Ashya were resumed and measured, a portion of this Rajdhar was measured as part of the resumed mehal, and settled with them in 1842:

though rightly made a party to the suit, could not be made liable for the plaintiff's costs, merely because he opposed the plaintiff's claim, and that, as he was dragged into suit by the wrong-doing of his predecessor and co-defendants, his costs should be charged to them.

As the oral evidence produced by the parties showed that the water-course, the subject of this suit, had been excavated and kept in repair by the former zemindars of Muhalat Khurrukpore, and the defendants were unable to prove any right to, or previous use of, the water for irrigating their lands, the decision of the lower court, directing that certain channels cut by the defendants be closed, was confirmed.

Held, that a party who had purchased the property after the act of trespass from the wrong-doers and was in possession when the suit was brought,

and plaintiff, though cognizant of this circumstance, made no objection to the measurement. It was added by the defendant Sookh Lal, that he was made a party to the suit without cause, as he had no interest in the property, and only acted as mooktear for the defendant; and the defendant Prem Lal asserted that an action for damages could not lie against him, as he had purchased the property from the owners subsequent to the decision of the Act IV. case.

The principal sudder ameen has decreed the whole claim of the plaintiff against all the defendants; and an appeal is preferred by them against that decision, *1st*, on the general ground that the decree has been given on insufficient evidence, as the plaintiffs were unable to offer any documentary or other satisfactory proof of their special right to the water-course called the Rajdhar, which is a natural and not an artificial stream; *2nd*, on special grounds by Sookh Lal and Prem Lal, the first alleging that he had no interest in the property, and could not, as mooktear for the defendant, be made a party and rendered liable for damages; the second pleading, that though the principal sudder ameen has specially exempted him from the decree as not being concerned in the alleged injury to the plaintiff, he has declared this appellant liable for damages and costs because he opposed the plaintiff's claim.

To support their affirmation, that the main water-course or Rajdhar was constructed by the rajahs of Khurrukpore, the plaintiff has produced sundry witnesses, who depose that they have heard that it was dug as asserted. They speak of it as having been constructed beyond the memory of man, and as a matter of public notoriety; and the defendants' witnesses also acknowledge that it is called the Rajdhar, because it was excavated and kept in repair by the former zemindars of Khurrukpore. This evidence of a matter of notoriety, better than which can scarcely now be expected, we think conclusive against the defendants' assertion that the Rajdhar was a natural stream, and only obtained that name because it was the main channel. With regard to the assertion made by the appellant, that the smaller water-courses or singahs are not of recent date, we find, on reference to the map prepared by the settlement officer in 1842, no appearance of their existence at that time, and had they then been in existence, some mention of them would have been made, at least in the measurement chittahs, if not in the map. The investigation of the darogah, when the case under Act IV. was pending, goes to prove that these singahs were lately made; and the local enquiries made by the ameen deputed by the civil court supports this view. As regards the appellants' claim to a portion of the Rajdhar, which they allege was measured as part of the resumed mehal, it is to be observed that the word Rajdhar is

written to the north and east of the resumed lands. It is the latter which is claimed by the plaintiff as being the water-course through which the water now flows to pergunnah Khiree ; and the former, described in the chittas as land, and which is dry, appears to have been the portion included in the measurement of chuk Ashya. We come to the conclusion, therefore, from the evidence laid before us, that the Rajdhar was dug by the former zemindars of Khurrukpoore to obtain water for the irrigation of pergunnah Khiree ; and as the defendants, appellants, have failed to show that they have a right to make use of the water, and have heretofore enjoyed that right, we think that the order of the lower court, directing that the water-courses or singahs made by the defendants, appellants, be closed, should be upheld. We do not consider the claim for damages can be sustained ; that claim is of too general a character, and the evidence to prove the occurrence of damage is vague and *unsatisfactory* ; and this part of the claim we dismiss. We find that the defendant Sookh Lal was one of the parties who sold the property to Prem Lal, and therefore we think that he was properly made a party to the suit, and is liable with the other defendants, except Prem Lal, for the costs of the suit to the plaintiff. As Prem Lal purchased the property subsequent to the construction of the singahs and the decision under Act IV. 1840, he, though properly made a party to the suit as being in possession of chuk Ashya, cannot be considered as a wrong-doer, and must be released from the claim, and his costs charged to his co-defendants. We alter the decision of the principal sudder ameen in accordance with the above remarks. The parties, except Prem Lal, will be respectively charged with costs according to the amount decreed and dismissed ; and the costs of Prem Lal will be borne by his co-defendants.

THE 22ND MARCH 1859.

A. SCONCE, ESQ., Judge, and E. A. SAMUELLS, ESQ., Officiating Judge.

Petition No. 1725 of 1858.

Application for Special Appeal from the decision of Mr. E. F. Latour, Judge of Behar, dated 31st July 1858, affirming that of Moulvee Syud Fureedooddeen, Moonsiff of Jehanabad, dated 9th July 1857, in the case of

Bhurrot Singh, Plaintiff, Opposite Party,
versus

Meer Saadut Alee, one of the Defendants, Petitioner.

Moulvee Mahomed Ismail, for Petitioner.

Baboo Gobindchunder Mookerjee, for the Opposite Party.

THIS suit was instituted by one Bhurrot Singh, to recover 6 beegahs out of 16 beegahs said to have been leased to him by petitioner, Meer Saadut Alee, on the ground of being dispossessed by Lekha Sahoo. This person, Lekha, also pleaded a pottah from Saadut Alee, but judgment has been given for plaintiff.

Petitioner, the alleged grantor of the plaintiff's pottah, did not appear in the first court; but he appealed to the judge, denying the execution of the pottah, and excusing his absence before the moonsiff on the ground that, not being resident within the district at the date of the action, notice of suit was not and could not have been given to him.

The zillah judge does not dispose of the objection taken by special appellant, as to the completeness of the finding of the first court; and we therefore remand the case to the judge, that he may enquire and consider whether special appellant has shown valid cause for his failing to appear to defend the action. If valid cause should be shown by petitioner, necessarily the record will go back to the moonsiff, that special appellant may have an opportunity of answering the claim.

Remanded to the zillah judge that he may try whether special appellant, a defendant who had not appeared in the first court, shows good cause for the failure in his appearance.

THE 23RD MARCH 1859.

H. T. RAIKES and J. H. PATTON, ESQS., Judges, and G. LOCH, Esq.,
Officiating Judge.

Case No. 628 of 1856.

Regular Appeal from the decision of Mirza Mahomed Siddiq Khan, Principal Sudder Ameen of Sarun, passed on 21st August 1856.

Rajah Sahib Perlal Sen, (Defendant,) *Appellant,*
versus

Dabee Dutt Misser, (Plaintiff,) *Respondent.*

Moonshee Ameer Alee and Baboo Shumbhoonath Pundit, for Appellant.

Baboos Ramapersad Roy and Kishenkishore Ghose, for Respondent.

CLAIM to recover rs. 8200, on a promissory note, with interest, from 6th Assin to 24th Srabun 1262, amounting to rs. 9151-4.

Plaintiff states that the rajah defendant executed the deed in question in the presence of the attesting witnesses ; that it was afterwards registered ; and the rajah having failed to pay, plaintiff sues to recover the amount of the note, with interest accruing thereon.

As the execution of the promissory note was proved, and the rajah refused to appear in court, and could not therefore file proofs in support of his denial, plaintiff's claim and decree were upheld.

The defendant denies the making of the note, and asserts that the plaintiff had no sufficient means to lend such sum ; that his mooktears and agents have, on several occasions, procured money in his name, without his knowledge or authority, and may have dealt treacherously in the present transaction.

The principal sudder ameen held the promissory note to be proved by the attesting witnesses and those who were present at the time of making it ; that, moreover, the defendant had been summoned as a witness on the part of the plaintiff ; and although process had been duly served, he neglected to attend : the case was therefore decided *ex-parte* on the proofs adduced by the plaintiff.

The appeal urges that the plaintiff was not a man of sufficient affluence to lend such a sum ; that the promissory note, though purporting to be registered, is not supported by any proof of authority on the part of the rajah to register the deed ; and that the agents of the rajah are very likely to have made use of his name in collusion with the plaintiff, and to have promoted this claim against him.

JUDGMENT.

We see no reason to interfere with the judgment of the lower court. The promissory note is proved by the depositions of the subscribing

witnesses, who say that it was executed in the lodging of the rajah's mooktears, Beharee Lal and Goota Lal, and the deed was afterwards registered. The rajah refused or neglected to appear in court to be examined, and is therefore not at liberty to produce proof in support of his defence. The objections taken by his pleader to the case of the plaintiff are, however, of no weight; they are merely suggested possibilities, which do not affect the direct evidence on the record, which, therefore, remains altogether unrefuted, and being sufficient to establish the claim of the plaintiff, we reject this appeal, with costs.

THE 23RD MARCH 1859.

A. SCONCE and C. B. TREVOR, Esqs., Judges, and H. V. BAYLEY, Esq.,
Officiating Judge.

Special Appeals from the decision of Mr. G. P. Leycester, Judge of Midnapore, dated 15th March 1858, reversing decrees of Baboo Poornoochunder Mitter, Sudder Ameen of that district, dated 5th July 1856.

Case No. 638 of 1858.

Doollubh Bhutt, (Plaintiff,) *Appellant*,
versus

Hurrokishen Mytee and others, (Defendants,) *Respondents*.

Moonshee Ameer Alee, Mr. R. T. Allan, and Baboo Kishenkishore Ghose, for Appellant.

Baboos Shumbhoonath Pundit and Unnodapersad Banerjee, for Respondents.

Case No. 639 of 1858.

Doollubh Bhutt, (Plaintiff,) *Appellant*,
versus

Kuroonakar Shusmal and others, (Defendants,) *Respondents*.

Baboo Kishenkishore Ghose and Mr. R. T. Allan, for Appellant.

Baboos Shumbhoonath Pundit and Unnodapersad Banerjee, for Kuroonakar Shusmal, Respondent.

Plaintiff lent to the defendants a certain quantity of grain, defendants covenanting that plaintiff should retain possession of certain lands belonging to them and repay himself from the crops. THESE cases were admitted to special appeal on the 28th September 1858, under the following certificate recorded by Messrs. C. B. Trevor and H. V. Bayley.

“Plaintiff lent to defendants on a bond certain dhan (grain), on the condition that if it were not repaid by a certain date, the plaintiff was to take possession of the defendants' land, and repay himself from the crops.

“The loan was not repaid, and the plaintiff sued for the equivalent in money. The moonsiff gave plaintiff a decree on proof of the

bond. The defendant appealed, and on the 9th June 1853 the judge nonsuited the plaintiff, as he held plaintiff could not sue for a money equivalent.

"On a special appeal to this Court, the order of nonsuit was upheld. Plaintiff then sued for possession till he should repay himself, and got a decree from the court of first instance. The judge, on appeal, on the 15th March 1858, again nonsuited the plaintiff, and ruled that he should proceed under the mortgage laws to obtain possession.

"Plaintiff appeals specially, urging that his suit was brought on the terms of the bond, and that the contract was a bond, not a mortgage, so that the judge's order of nonsuit, on the ground that the plaintiff had not followed the mortgage laws, was incorrect.

"Looking at the circumstances of this case, as above stated, we admit the special appeal to try this point."

JUDGMENT.

Plaintiff, petitioner, who is a mahajun, lent to Shibchunder and others, defendants, a certain quantity of grain, defendants covenanting at the same time that plaintiff should retain in his possession certain lands belonging to them, and repay himself from the crops. Plaintiff obtained possession, but was subsequently dispossessed by the defendants. He then sued for the equivalent of the grain lent in money. The courts, whether rightly or wrongly, is not now in question, nonsuited him, relegating him to the terms of his bond.

Plaintiff then sued for possession of the lands mortgaged to him, in order that he might repay himself, according to its terms, from the productions of the lands. The sudder ameen decreed plaintiff possession, but the judge, on the separate appeals of two defendants, reversed the order of the court below, nonsuiting the plaintiff, inasmuch as plaintiff was not at liberty to disregard the procedure laid down by Regulation XVII. of 1806, with reference to mortgages. Against the orders passed on the two appeal cases, two special appeals have been now preferred.

The judge has altogether misunderstood the plaintiff's case. The lands were pledged to plaintiff, in order that he might repay himself from the productions of them. The transaction was in the nature of a usufructuary mortgage; and the law of 1806, applicable to conditional sales, was entirely beside the question before him. Under this view the order of the judge cannot stand; and as plaintiff's present suit is brought in correct legal form under the agreement between him and the defendants, we remit the cases to the judge, with directions that he will enquire into the merits of the case, and pass such a judgment as may appear to him to be proper.

the crops. Plaintiff obtained possession and was subsequently dispossessed by defendants. He then sued for the equivalent of the grain in money. The court nonsuited him. He now sues for possession, in order that he may repay himself from the produce of the lands, according to the terms of the contract. The lower court gave plaintiff a decree. The judge, on the appeal of two defendants, nonsuited the plaintiff, as plaintiff was not at liberty to disregard the procedure laid down by Regulation XVII. of 1806 with reference to mortgages.

Held on special appeal, that the judge's order was incorrect; that the transaction was in the nature of a usufructuary mortgage; and the law of 1806, applicable to conditional sales, was entirely beside the question.

Cases remitted for re-investigation on the merits.

THE 23RD MARCH 1859.

A. SCONCE and C. B. TREVOR, Esqs., Judges, and H. V. BAYLEY, Esq.,
Officiating Judge.

Case No. 545 of 1858.

*Special Appeal from the decision of Mr. W. S. Seton-Karr,
Officiating Judge of Jessore, dated 16th February 1858, reversing
a decree of Moulvee Abdool Jubbar, Moonsiff of Noabad,
dated 28th July 1857.*

Kirtinarain Deb, (one of the Defendants,) *Appellant,*
versus

Mudhoosoodun Chuckerbuttee, (Plaintiff,) and Musst. Hurromonee Debea and others, (Defendants,) *Respondents.*

Baboo Gopal Lal Mitter, for Appellant.

Baboo Bhoobunmohun Roy, for (Plaintiff,) Respondent.

Suit brought by purchaser at an execution sale to recover his purchase money (still in deposit,) on the ground of the sale being set aside on proof of the debtor's having no title to the property sold. Judgment having been given for plaintiff, the decree-holder in the execution case urges in special appeal that, with reference to the decision given at page 1091 of Decisions of 1857, the suit will not lie.

THIS case was admitted to special appeal on the 30th August 1858, under the following certificate recorded by Messrs. C. B. Trevor and H. V. Bayley.

"Kirtinarain held a decree against one Hurromonee, and in execution of it brought to sale her rights and interests in certain property. Mudhoosoodun purchased those rights and interests, and paid in a certain sum as purchase money, which has since remained in deposit in court.

"One Sreenath Mookerjee sued to set aside the sale, on the ground of Hurromonee's having no right or interest in the property ; and it was reversed on his suit.

"The purchaser (plaintiff) on this sued to recover the purchase money in deposit. The decree-holder, defendant Kirtinarain, answered that the money was in deposit, and prayed to be held exempt from liability and costs. We have only before us the abstract of the answer as given in the moonsiff's decision, and cannot find from that abstract whether there was a clear admission by this defendant of the justice of plaintiff's claim, or not.

"The moonsiff held that, under the Sudder Dewanny Adawlut's decision of the 28th November 1855, (Dost Mahomed Khan Chowdree's case, page 549,) the plaintiff's suit must be dismissed.

"The judge, on appeal, held that 'it was simple matter of justice that the plaintiff should get his money back,' and that the precedent cited did not apply, as in that case the sale was not reversed.

"The judge charged Kirtinarain, defendant, with costs.

"Kirtinarain now appeals specially, urging, 1st, that plaintiff cannot sue under the ruling of the 28th November 1855 before cited, and that of the 27th June 1857 (page 1091, Ramsoodere Debea's case) ; and, 2ndly, that as Kirtinarain did not contest plaintiff's claim, he should not be charged costs.

Held that, as special appellant in his answer denied his liability for the sale, which he ascribed to the collusion of his pleader, he substantially gave up all claim to benefit by the purchase money.

"On a reference to the moonsiff's decision, we do not find that the defendant there pleaded that plaintiff could not sue under the precedents cited, or any other ruling; and we have doubt as to whether the decision of the 27th June 1857 can apply to cases like this, where the purchase money has not passed to any one, but remains a judicial deposit in the treasury, capable of being followed by the purchaser who deposited it.

"We admit the special appeal, therefore, to try : *1st*, whether, under the apparent admission, by special appellant, that the money was in deposit and available for plaintiff, the lower courts could properly decide the case with reference to the precedents cited; *2ndly*, whether those precedents apply to the circumstances of this case, with reference to the purchase money being still in deposit, and not having passed to any one; and, *3rdly*, whether, if plaintiff can sue, defendant is properly liable for costs."

JUDGMENT.

We find, from the answer made by the special appellant in this case, that he in substance gave up all claim to benefit by the purchase money. He said that the sale had not been brought on by himself, but by his pleader (whom he had displaced) in collusion with Hurromonee. He further denied his liability to pay plaintiff interest or costs, as the money was in deposit.

Under such circumstances, looking to the case which special appellant made for himself in the first court, we see no ground to interfere with the judge's orders, further than to direct that the plaintiff shall pay his own costs throughout. The other points taken in the certificate do not arise.

THE 23RD MARCH 1859.

A. SCONCE and C. B. TREVOR, ESQS., Judges, and H. V. BAYLEY, ESQ.,
Officiating Judge.

Case No. 615 of 1858.

*Special Appeal from the decision of Mr. C. Mackay, Principal
Sudder Ameen of Sylhet, dated 9th April 1858, reversing a
decree of Baboo Hurgouree Bose, Moonsiff of Russoolgunge,
dated 24th October 1857.*

Bissakha Debea, (one of the Defendants,) *Appellant,*

versus

Hurrochunder Surma, (Plaintiff,) and Sudanund Surma and others,
(Defendants,) *Respondents.*

*Baboos Kishenkishore Ghose, Obhoychurn Bose, and Baneyma-
dhub Banerjee, for Appellant.*

Moulvee Mahomed Ismail, for Respondents.

Case remitted,
in order that
the principal
sudder ameen
may remand the
case to the
moonsiff, who
will give the
plaintiff an op-
portunity of fil-
ing the petition
alleged to have
been executed by
the defendant,
acknowledging
the sale of the
property in suit
by her husband
Sudanund to
the plaintiff,
and who will,
after testing its
genuineness, if
it be questioned,
and scrutinizing
its terms, pass
whatever order
may eventually
seem just and
proper.

THIS case was admitted to special appeal on the 23rd September 1858, under the following certificate recorded by Messrs. C. B. Trevor and H. V. Bayley.

“Hurrochunder Surma sued Sudanund Surma and Bissakha Debea, his wife, and Rai Gobind Surma, for possession of certain lands under a deed of sale, dated 24th Pous 1261 B. S., executed by Sudanund.

“Sudanund pleads that the deed of sale was benamee, and that really his wife Bissakha was the seller, to whom the property belongs.

“Bissakha claims the land as hers, and Rai Gobind pleads that a portion of the land in suit has been purchased by him from Bissakha.

“The moonsiff dismissed plaintiff's claim, on the ground chiefly that Sudanund had no right to execute the deed of sale, the right to the property being with his wife Bissakha.

“On the same date the moonsiff decided a claim for two reas of land, now sued for, in favor of Rai Gobind, one of the defendants in this case; and he grounded his judgment on the right of Bissakha to the property, and to her having, under the right, conveyed it to Rai Gobind.

“No appeal has been preferred from this last order. An appeal has, however, been preferred from the first; and the principal sud-der ameen has, in the case before him, reversed the order of the lower court, decreeing to the plaintiff the land claimed by him under the deed of sale executed by Sudanund, with the exception of that decreed by the moonsiff in favor of Rai Gobind under a deed executed by Bissakha: thus he has declared the property to belong to Sudanund, and who at the same time accepted a decision of the moonsiff, holding that it belongs to his wife Bissakha.

“Against this inconsistency the defendant Bissakha has now appealed, urging that it is one vitiating altogether and rendering obscure the decision passed by the principal sudder ameen, and urging also, that the admission alleged to have been made by her is not upon the record, and that it consequently should not have been regarded by the principal sudder ameen.

“We admit the special appeal to try whether, in consequence of the error above noted, the decision of the principal sudder ameen should not be remanded to him for a more perfect investigation.”

JUDGMENT.

Messrs. C. B. Trevor and H. V. Bayley.—We observe that the principal sudder ameen bases his opinion, that the sale to the plaintiff by Sudanund, the husband of Bissakha, special appellant, is valid, on a petition filed by the latter, in another case, in which she was plaintiff and Shamram Paul and others defendants, and in which she has distinctly admitted the sale in question, as well as on her having affixed her name to the deed of conveyance as a witness: such having been the case, she cannot, remarks the principal sudder ameen, be listened to when pleading to the contrary.

There is no doubt great force in the remark of the principal sudder ameen: but the petition is not on the record, so that special appellant has had no opportunity of questioning the interpretation put upon it; and unless a copy of the petition had been filed before him, the principal sudder ameen was not justified in noticing it at all.

We consider, therefore, that the proceeding of the principal sudder ameen is objectionable; and as the existence of an important document of the nature above specified is clear, we remit the case to the principal sudder ameen, with directions that he remand it to the court of first instance. The moonsiff will then give the plaintiff an opportunity of filing a copy of the petition, alleged to have been executed by the defendant, acknowledging the sale of the property by her husband Sudanund to the plaintiff, and after having tested its genuineness, if it be questioned, and scrutinized its terms, pass whatever decision may eventually seem just and proper.

Mr. A. Sconce.—I concur that the principal sudder ameen's judgment is defective; but, instead of remanding the case to the first court, it appears to me sufficient to instruct the principal sudder ameen to give the plaintiff an opportunity of filing the petition in his own court, and to take such steps as he may deem sufficient in disposing of any question that may arise as to its authenticity.

THE 23RD MARCH 1859.

A. SCONCE and C. B. TREVOR, ESQS., Judges, and H. V. BAYLEY, ESQ.,
Officiating Judge.

Case No. 123 of 1858.

Special Appeal from the decision of Mr. E. S. Pearson, Additional Judge of Backergunge, dated 29th July 1857, reversing a decree of Pundit Sreenath Bidyabagish, Principal Sudder Ameen of that district, dated 17th November 1856.

Musst. Mohun Malla, (Plaintiff,) *Appellant*,
versus

Mr. Robert Hollow and others, (Defendants,) *Respondents*.

Baboo Ramapersad Roy and Kishenkishore Ghose, for Appellant.

Baboo Shumbhoonath Pundit, for Mr. R. Hollow, Respondent.

Suit to set aside sale of an under-tenure made in execution of a summary decree, which, in a regular suit subsequently instituted, had been annulled; also to quash a second summary suit and second sale.

THIS case was admitted to special appeal on the 18th February 1858, under the following certificate recorded by Messrs. A. Sconce and J. S. Torrens.

"Petitioner comes up against the decision of the judge, which has held her suit for recovery of possession of 8 annas of a hawalah, and to cancel sales in execution of summary awards, barred under provisions of Section VI. Regulation VIII. of 1831. The statement of plaintiff, petitioner, is, that she purchased the 8 annas from the former hawaladar; but, notwithstanding that she had paid the rent, the zemindar, on a summary suit brought against her vendor, got a decree on the 22nd of January 1844, in execution of which it was sold on the 23rd of March following. Petitioner sued to set aside the summary decree, and obtained decisions in her favor before the sudder ameen and principal sudder ameen; the latter dated the 21st of March 1846, the order being confirmed on a special appeal before this Court in 1849. After the sale of the 23rd of March 1844, the zemindar brought another summary suit for the rent of 1258 B. S. of 10a.-13g.-1c.-1k. of the 8 annas of the hawalah against the purchaser. Plaintiff, petitioner, appeared before the collector, whose orders in decree were that her rights were not affected; and on the 7th of February 1853 the 10a.-13g.-1c.-1k. were sold in execution of the summary decree. The present suit is instituted on the 3rd of January 1856; and the objections taken to the judge's decision are, that, as plaintiff, petitioner, was not a party to the last summary suit, her right of action cannot be limited in the manner held by the judge; next, that the one year limitation laid down in Regulation VIII. of 1831 does not

Held, that though this suit was not instituted till more than one year had elapsed from date of second summary decree, plaintiff's action was not barred, as plaintiff was not personally liable as a defaulter in the second summary suit, and as plaintiff had specially pleaded and the principal sudder ameen found that the zemindar himself held the under-tenure in the name of his naib, and brought a collusive suit against the nominal tenant.

Held also that, with respect to the second sale in execution, a suit to set it aside is not restricted to one year from the date of the sale.

apply to suits for reversal of sales ; and that, independently of these objections, the judge is wrong in refusing her possession of the difference between the 10a.-13g.-1c.-1k. of the 8 annas of the hawalah, and the remainder, as the latter summary decree and sale, on which the right to possession is set up, only related to the 10a.-13g.-1c.-1k.

"We admit the special appeal, to try the correctness of the judge's decision with advertence to the second objection above noticed."

JUDGMENT.

The decision pronounced by the zillah judge in this case is* subjoined. The judge has thrown out the suit, assigning mixed reasons

* The plaint states that the above hawalah (in the name of Nundkissore Chuckerbuttee and Muddunmohun Chuckerbuttee within defendant's independent talook Panioty Alexander, Pergunnah Boozoorg Omedpore) was sold, on the 23rd March 1844, in execution of a summary decree against her vendor, Muddunnarain Chuckerbuttee ; that she sued regularly for reversal of that summary decree, and obtained a decree in her favor, which decision was upheld by the Sudder, on special appeal, on 2nd August 1849 ; that subsequently the defendant, Mr. R. Hollow, sued the auction purchaser, Rajchunder Chuckerbuttee, summarily, for arrears of rent for 1258, and obtained a decree, in execution of which a portion of the hawalah of suit was again sold. Plaintiff sues, therefore, for possession of her 8 annas hawalah in reversal of the sale in execution of the first summary decree, and of the second summary decree, together with the sale in execution of it. Defendant pleaded, that plaintiff had split her claim, *viz.* that she should have sued for reversal of the first sale along with the decree ; also that her alleged purchase from Muddunnarain Chuckerbuttee is fictitious ; also that her present suit, to reverse the second summary decree and sale, is out of time according to Section VI. Regulation VIII. of 1831.

The lower court gave judgment for plaintiff, considering that the sale, in execution of the first summary decree, was virtually cancelled by the Sudder Court's decision of the 2nd August 1849, and that, this being the case, the second summary decree and sale must necessarily fall with it. The court likewise held that the second summary suit was a fraudulent one, as defendants were really in possession of the hawalah all along, the first auction purchaser being a mere creature of straw ;—this opinion being apparently based upon the fact of the said auction purchaser's being defendant's naib.

The points for decision are, 1st, whether this suit is out of time ; 2nd, if not, whether the second summary decree and sale were irregular, or otherwise liable to be reversed.

It is clear that the first sale in execution either fell as a necessary consequence of the Sudder Court's decision of the 2nd August 1849, or it did not. If it did, there is of course no occasion for plaintiff to bring this suit to cancel that sale, for she could obtain possession of her hawalah in cancelment of it by simply taking out execution of her decree aforesaid, but then intermediately there have been summary proceedings, *viz.* a decree and a sale, which must be taken out of the way before she can avail herself of her decree. How are these to be taken out of the way ? Clearly only by a regular suit ; for they have actually been held, and their existence cannot be ignored : but in order to set aside summary decrees for rent, one must sue within a year, and this plaintiff has not done. Therefore the second summary decree and sale cannot be taken out of the way, and must stand. If, on the other hand, the first sale did not fall as a consequence of the Sudder's decision of August 2nd 1849, so that it becomes necessary for plaintiff to bring this suit to cancel that sale, her suit is equally out of time ; for the ground for seeking cancelment of the sale must be the injustice of the decree ; hence the suit must be brought within a year. Besides which, there is another reason why plaintiff cannot now sue to cancel the first sale,

for his order ; but substantially the suit stands dismissed as barred by lapse of time.

Special appellant acquired in Pous 1249, by private purchase, one-half of a hawalah situated within the zemindar's (defendant's) estate. Subsequently, the zemindar, suing summarily for arrears of rent of 1250, asserted to be due on account of this half, acquired a decree for the amount on the 22nd January 1844, and on the 23rd March following caused the half hawalah to be sold in execution, when it was purchased by one Rajchunder, his own naib. Later, the zemindar again sued the purchaser for arrears of 1258, and, on the 5th January 1853, the zemindar causing (under circumstances not explained to us) a two-third share of the half hawalah to be sold in execution, he bought it in himself on the 8th February 1853 for one rupee. Meanwhile, however, special appellant had instituted a regular suit to set aside the first summary decree, and both in the zillah courts, as in this Court on the admission of a special appeal, the summary decree was quashed.

Such are the circumstances which have led to the present action, in which it is the object of plaintiff to be restored to possession of her half hawalah, by declaring the first sale null and void, and by quashing the second summary decree as well as the second sale that followed it.

This suit was not instituted till the 3rd January 1856, and the judge holds that, as more than one year has elapsed from the dates of the second summary decree and sale on the 5th January and 8th February 1853, the action is barred by Section VI. Regulation VIII. of 1831. This conclusion, however, appears to us to be untenable for two reasons : *first*, we think that the restriction imposed on a tenant in possession as to the time within which he should prefer a regular suit to contest a summary award made against him, cannot apply to a person in the position of the present plaintiff, who was not personally a defaulter, and who was determined, by an action decided before the entertainment of the zemindar's second summary suit, to have been erroneously declared a defaulter by the first summary suit. The plaintiff's suit cannot be said to turn on the merits of the second summary claim for arrears. On the contrary, it is brought against the zemindar and ostensible tenant, on the ground of the original ouster of plaintiff being illegal. But, *secondly*, we observe, that the plaintiff, special appellant, asserted a special ground

viz. she ought to have included this prayer in her suit for reversal of the first decree. Her not having done so is a most vexatious splitting of claims. And even though it should be held that the one year rule would not apply, and that the splitting of claims is no bar to this suit, yet the second decree and sale would still remain to be taken out of the way, which, as I have above shown, cannot now be taken out of the way. In short, plaintiff has slept over her rights, and the maxim, "*vigilantibus non dormientibus jura subveniunt*," clearly applies. I reverse the lower court's decision, and dismiss the suit as out of time. Costs on respondent.

for the inapplicability of the law of limitation. She asserted, and the principal sudder ameen found that the second summary decree was obtained on fraud, inasmuch as the purchaser at the first sale was the naib of the zemindar and a mere nominal tenant, and that the zemindar, himself in possession of the hawalah, sued himself for arrears due. Upon this question the zillah judge passed no opinion; but obviously the plaintiff's right of action could not be denied to her from any act of collusion done by the zemindar and his nominal tenant.

Again, the judge has held the suit to be barred, because it was not brought within one year from the first sale. But for this construction the law affords no warrant. The law is confined to regular suits brought to contest summary decrees, and not to sales made in execution of summary decrees. In this instance, as already said, the first summary decree has been set aside; and there is no room for extending to the sale a default which might have, but did not in fact, bar the suit by which the summary decree for arrears was annulled.

We, therefore, set aside the judge's decision, and remand the case, to be disposed of on its merits.

THE 23RD MARCH 1859.

A. SCONCE and C. B. TREVOR, ESQs., Judges, and H. V. BAYLEY, ESQ.,
Officiating Judge.

Case No. 491 of 1858.

Special Appeal from the decision of Syud Ahmed Buksh, Principal Sudder Ameen of Mymensing, dated 29th March 1858, reversing a decree of Baboo Gungakant Mookerjee, Additional Moonsiff of Madargunge, dated 27th January 1857.

Roodrokant Surma Chowdree and others, (Defendants,) *Appellants,*
versus

Kasheenath Surma Chowdree, (Plaintiff,) *Respondent.*

Baboo Kishensukha Mookerjee, for Appellants.

Baboo Taruknath Sen, for Kasheenath Surma, one of the Respondents.

THIS case was admitted to special appeal on the 3rd August 1858, under the following certificate recorded by Messrs. C. B. Trevor and H. V. Bayley.

Suit, brought to give effect to a deed of compromise said to have been executed after an earlier suit between the same parties was decided, was dismissed by the first court as being in a matter already adjudicated; but the case was remanded by the lower appellate court on the ground that the plaintiff had set forth in this suit a new cause of action. Order of remand affirmed in special appeal.

"The plaintiff sued for possession of a share of an ancestral estate. The moonsiff dismissed his suit on the 27th January 1857, on the ground that, although the plaintiff had been allowed full opportunity to adduce proof, he had not produced any.

"The plaintiff then sued for the fulfilment of the terms of a deed of compromise executed by three of the defendants, who refused to fulfil its conditions, and which deed one of the defendants had refused to sign, and kept possession of. The plaintiff averred that, owing to this deed of compromise being at the time a matter of negotiation between the parties, he was unable to adduce the proofs, in the case decided against him on the 27th January 1857, which he otherwise might have done.

"The moonsiff considered that the subject matter of the latter suit was identical with that of the former, and, on the 30th November 1857, dismissed the case under Section XVI. Regulation III. of 1793.

"The principal sudder ameen reversed this decision, without going into the question of the correctness of plaintiff's allegations in respect to the deed of compromise, but merely holding that the suits were not for the same subject matter, and that therefore Section XVI. Regulation III. of 1793 did not apply.

"The special appellant's pleader urges, that the principal sudder ameen should not have remanded the case, or held Section XVI. to be inapplicable, until he had investigated the point, whether a deed of compromise relating to the same subject matter had been executed by three of the defendants, as averred by plaintiff, or had not been so, as stated by defendants. Further, that the fourth defendant, who was stated by plaintiff to have refused to sign the deed, should be exempted from liability in this case.

"We admit the special appeal, to try whether the case should not be remanded on the above grounds for further investigation."

JUDGMENT.

We find that this second suit is brought by the plaintiff to give effect to a soolahnama, by which, according to him, the four defendants in the case had adjusted their dispute with him. This deed is said to have been executed five days after the first suit was decided. It would be premature now to offer any opinion as to the transaction asserted by plaintiff to have occurred; but, taking the case as plaintiff puts it, it presents a new cause of action, and, therefore, it appears to us, that the principal sudder ameen has rightly held that the question, as to the propriety of bringing the defendants again into court, cannot be disposed of till the plaintiff has had an opportunity of going into his proofs. He could not summarily say that the suit would not lie either against the three

defendants said by plaintiff to have signed the deed, or against the fourth, who is said to have agreed to it but did not sign it, till the facts asserted by plaintiff have been sifted.

We dismiss the special appeal, with costs.

THE 24TH MARCH 1859.

H. T. RAIKES and J. H. PATTON, Esqs., Judges.

Petition No. 1805 of 1858.

Application for Special Appeal from the decision of Roy Ram-lochun Ghose, Principal Sudder Ameen of Nuddea, dated 10th August 1858, amending that of Baboo Baneenath Bose, Acting Sudder Ameen of that district, dated 6th March 1858, in the case of

Mr. Henry Mackenzie, (Plaintiff,) *Petitioner,*
versus

Chunder Seekhur Roy, (Defendant,) *Opposite Party.*

Baboo Unnodapersad Banerjee, for Petitioner.

Baboos Kishenkishore Ghose and Obhoychurn Bose, for the Opposite Party.

It is hereby certified that the said application is granted on the following grounds.

The controversy raised below was regarding the mode of credit adopted by the petitioner, in crediting to respondent some arrears of rent paid by him.

Remanded, for trial whether the credits to current rent and bakaya were proper or not.

A summary suit had been instituted by the petitioner ; and to set aside the award passed, this regular suit was brought by respondent.

The question was, whether the amount received had been credited properly by petitioner, partly to bakaya and partly to current rent. If the petitioner was entitled to carry the amount he had carried to old arrears, his summary suit for current revenue would be correct, as representing the amount he was justified in suing for in that form. If he was not entitled so to credit it, but should have treated all the payments made by respondent as on account of current rents, his claim by summary suit would be invalid.

This the principal sudder ameen has not apparently tried ; and we therefore remand the case to be so dealt with.

THE 28TH MARCH 1859.

H. T. RAIKES and J. H. PATTON, ESQs., Judges, and G. LOCH, Esq.,
Officiating Judge.

Case No. 580 of 1856.

*Regular Appeal from the decision of Baboo Wopendrochundro
Nyaruttun, Principal Sudder Ameen of Jessore, dated 28th
August 1856.*

Syud Keramut Alee, (Plaintiff,) *Appellant,*
versus

Rajah Barodakant Roy and others, (Defendants,) *Respondents.*

Baboo Ramapersad Roy, for Appellant.

*Baboo Shumbhoonath Pundit, Kishenkishore Ghose, and Obhoy-
churn Bose, and Mr. R. T. Allan, for Respondents.*

Suit laid at Company's Rupees 37,752-9a.-0p.-2k.

Decision of
the lower court
confirmed, as
the evidence
produced by the
plaintiff was
considered in-
sufficient to
prove his right
to, and previous
possession of,
the tract of
reclaimed jungle
land in dispute.

THE plaintiff in this case is the mootuwullee of certain wuqf property in zillah Jessore, and he brings the present suit to reverse a decision passed by the magistrate, under Act IV. 1840, on the 20th April 1847, and confirmed by the session judge, by which possession of certain lands, 3433-6 in extent, claimed by him as chuk Alugdea and chuk Roy Thakur, appertaining to the wuqf village of Sobnah, was assigned to the defendants, who claimed them as chuk Seebpoor and Badoorgatcha, within his zemindaree of pergunnah Shahoos. The principal sudder ameen deputed the moonsiff of Bala to make a local investigation; but, setting aside the opinion expressed by that officer as to the rights of the litigants, he has dismissed the plaintiff's suit, considering his claim to these lands not to have been satisfactorily proved.

An appeal has been preferred by the plaintiff from this decision. It is asserted by the appellant that the natural boundary between the wuqf village mouzah Sobnah and the defendant's zemindaree in pergunnah Shahoos is the Khanapurya river, to the east of which is situated the defendant's estate, and to the west that of the plaintiff. From the pleadings it appears that to the west of the Khanapurya river is a tract of jungle land, divided, according to the plaintiff, into five chuks, Bagagatcha, Badoorgatcha, Jebuntola, Roy Thakur, and Alugdea, belonging to the plaintiff's village Sobnah; that the defendant has crossed the Khanapurya river, and taken possession of the lands of chuks Alugdea and Roy Thakur, and avers that a khal, known by the name of the Badoorgatcha and Bawer khal, is the boundary between the estates. In support of his claim plaintiff rests mainly on the local investigation of the moonsiff of Bala, dated the 27th May 1856, to whom the documentary evidence filed in this case was submitted. These documents consist of some measurement chittas of 1237, bearing

the seal of the collector, and produced from the wuqf serishtah. He has also filed a map from the survey of Mr. Deputy Collector Smith, about 1842, and certain proceedings thereon under Regulation II. of 1819, and sundry kuboolyuts. From these documents it would appear that the jungle tract, including chuks Alugdea and Roy Thakur, were measured by orders of the collector in 1235, corresponding with 1828 ; that Mr. Smith, deputy collector in charge of the wuqf mehal, surveyed the lands of mouzah Sobnah, and by his survey the disputed lands are included within the area of that village, the eastern boundary of which is shown to be the Khanapurya river ; that on his report being submitted to the commissioner, that officer, on the 18th December 1844, directed the collector to ascertain whether these jungle lands did or did not belong to the Government property in the Soonderbuns ; that the collector, in his proceeding under Regulation II. of 1819, dated the 15th August 1845, to which both the present litigants were parties, released the lands, declaring them to belong to the wuqf estate, and this order was confirmed by the commissioner's proceeding of the 30th May 1846, who struck off the case, as the land was evidently not within the limits of the Soonderbuns. The moonsiff, when making the local investigation, tested the chittas of 1235 filed by the plaintiff, and identified the lands to which they related ; and he was able to ascertain that the lands in dispute were comprised in daghs 3205 and 3206, the boundaries therein laid down corresponding exactly with those now in existence, while from dagh 3198 he found that the boundary of the Sobnah village on the east was the Khanapurya river. He, at the same time, endeavored to identify the lands referred to in certain chittas of 1232, bearing the seal of the collector, filed by defendant, but failed to ascertain their site, and he rejected as spurious a pottah of 1232, said to have been given by the collector to Shibchunder Chowdree on the part of the defendant. The moonsiff held further, that the lands now in dispute formed the subject of the investigation under Regulation II. of 1819, held by the collector in 1845, and this was admitted by the defendant in his answer in the Act IV. case, to reverse which the present suit has been instituted. The moonsiff also examined 173 witnesses, whose evidence he rejected as unworthy of credit ; but with reference to the position of the disputed area, and to the enquiries he was able to make both openly and privately, he came to the following conclusion, that the area in dispute was formerly not known by the names now used by the parties to designate it, but was called the Kala jungle, and was claimed neither by the zemindar of Shahoos, nor by the mootuwullee of the wuqf property. Subsequently a person named Sridhur Roy, from whom chuk Roy Thakur derived its name, having obtained a pottah from the surbarakar of the wuqf property, commenced clearing the jungle, but was obliged to leave the

place from fear of the tigers, on which the Chowdrees of Shahoos took possession of and cultivated the land, and on Sridhur's attempting to recover possession, they got up a charge of murder against him, and so prevented his having anything further to do with it; and so the Chowdrees have held possession of that portion of the land called Alugdea by the plaintiff, lying to the east of a khal called Jhila and to the west of the Khanapurya river, for more than fourteen or fifteen years previous to 1254, and of the land to the west of the Jhila (called Alugdea by the plaintiff) and to the east of the Bilboorya khal, for not less than four or five years; and the lands to the west of the Bilboorya khal and to the east of the Badoorgatcha and Bawer or Tyer khal (called by the plaintiff Roy Thakur Chuk), have sometimes been partially cultivated by the Sobnah ryots, who, after cutting their crops, let the land fall into jungle, when the Shahoos ryots cultivated it; and when they left it, the Sobnah ryots again cultivated it; and in this manner the land got cleared, and then disputes arose, which terminated in possession being taken of the land by Gungadhur Chowdree of Shahoos, in 1250 or 1251, since which time he has held undisturbed possession. The result, therefore, of the moonsiff's inquiry, on which plaintiff lays much stress, is, that part of the land has been in the adverse possession of the defendant for more than fourteen years previous to 1254; another portion has been in his possession not less than five years previous to that date, and the remainder has been in his undisturbed possession since 1250 or 1251.

We turn now to the other documents filed by the plaintiff. The chittas of 1235 clearly define the boundaries of the disputed lands, and by their assistance these lands can be easily identified; and if we could accept these chittas as genuine, they would go far to establish the plaintiff's claim. But we are not informed on what occasion they were prepared, nor why it is that so many years elapsed before they saw the light, nor why they were not produced in the Act IV. case now sought to be set aside, or in other contentions which, from the pleadings we gather, have taken place between the parties. Again, though we do not question the accuracy of Mr. Smith's survey, which includes these disputed lands in the area of Sobnah, yet we are left in ignorance of the data on which that survey was made. Further, as regards the decisions under Regulation II. of 1819, it may be observed that, though the collector, in his proceeding of the 15th August 1845, to which the present litigants were parties, stated that the lands then released from resumption belonged to the wuqf property, yet this declaration can avail the plaintiff but little; for the question then before the collector was, not whether the lands belong to one or other, but whether these lands were within the boundary of the Soonderbuns, and, consequently, liable to the claim of Government; and the collector decided that they were not. If

any stress be laid upon this proceeding, the defendant has produced a counter-proceeding of the commissioner of the Soonderbuns, Baboo Oomakant Sein, dated the 23rd May 1846, who, while the collector of Jessore was engaged in making the investigation on his part, was deputed by the commissioner to enquire whether these lands were within the Government property and in whose possession they were; and he reported that they were *not* within the boundary of the Soonderbuns and were in the possession of the Shahoos zemindar. It is urged by plaintiff, that he was not aware of the investigation held by Oomakant Sein, as no notice was served on him; but in support of this assertion no evidence has been produced, and it appears improbable that, considering the contentions then going on and the inquiries then being held by the collector of Jessore, which would turn the attention of the parties to these lands, the plaintiff should have remained ignorant of the proceedings of Baboo Oomakant Sein. Be that as it may, the final proceeding of the commissioner, drawn up after a consideration of the investigation made by the collector and the commissioner of the Soonderbuns, merely declares that the Government has no claim to these lands, and determines nothing as to the possession or rights of the parties. The appellant's counsel attaches no great weight to the kuboolyuts filed by the parties. Two kuboolyuts have however been shown us, to which reference has been made in the course of the argument. One signed by Ramlochun, dated the 5th February 1840, which, on examination of the recorded boundaries, evidently relates to land other than that in dispute, *viz.* the lands of chuk Jebuntola to the westward; and the other, dated 6th Srabun 1237, executed by Juggutram Mitter for the julkur of mouzah Sobnah, and in which the eastern boundary of the village is carefully given as Shahoos on the Khanapurya river. Neither of these kuboolyuts has been attested; and the one, as already shown, evidently relates to lands other than those in dispute; and the careful mention of the eastern boundary in a julkur pottah raises a suspicion that it has been prepared for the purpose. We think, therefore, after a consideration of the documents and other evidence produced by the plaintiff, that he has not satisfactorily established his right to the lands in dispute, and we therefore confirm the decision of the lower court, and dismiss the appeal, with costs. We would remark that the principal sudder ameen is in error in stating that the deputy collector, Mr. Smith, in charge of the wuqf property, admitted that these lands were Government property. We do not find such a statement in any of the proceedings before us, and consequently the principal sudder ameen's argument, based on such supposed admission, falls to the ground.

THE 28TH MARCH 1859.

H. T. RAIKES and J. H. PATTON, Esqs., Judges, and G. LOCH, Esq.,
Officiating Judge.

Case No. 634 of 1856.

Regular Appeal from the decision of Baboo Pearymohun Banerjea, Principal Sudder Ameen of Beerbhoom, dated the 8th November 1856.

Messrs. Gordon, Stuart, and Company, Secretaries of the Bengal
Coal Company, (Plaintiffs,) *Appellants*,
versus

Neerunjun Acharj and others, (Defendants,) *Respondents*.

Baboo Ramapersad Roy, for Appellants.

Baboos Shumbhoonath Pundit and Baneemadhub Banerjee, for
Respondents.

Suit laid at Company's Rupees 9053-12-0.

Remanded: the
order of non-
suit was not
justified when
plaintiff suffi-
ciently indicat-
ed the extent
and boundaries
of the lands.

THE appellants, as plaintiffs, brought this action in the lower court to recover possession of 340 beegahs 14 cottahs in mouzah Gopeenathpore *alias* Sajur Bangah, with mesne profits, on the allegation that the defendants had ousted them from the land. They urge that the land is comprised in sixteen plots, with separate boundaries defined in each, as specified in the schedule annexed at the foot of the plaint.

The defendants, respondents, pleaded that the suit could not be entertained, owing to the plaint being defective, in not specifically defining the boundaries of certain *dewutter* lands comprised within the area claimed by the plaintiffs, and failing to make the holders of them parties to the suit.

The plaintiffs on this applied for and obtained the permission of the court to cure the defects noticed, by filing a supplemental plaint, which was done accordingly.

The principal sudder ameen, in trying the case, first took up the plea in bar; and ruling that the defects in the plaint had not been sufficiently cured by the supplement filed by the plaintiffs to admit of execution of judgment in the event of such being made in the case, passed an order of nonsuit.

Against this order the plaintiffs now appeal, and urge that the supplemental plaint filed by them rectifies the omissions apparent in Nos. 13, 15, and 16 of the schedule as to the quantity of resumed dewutter land, and points to the measurement chittas prepared by the officers of the Government for further particulars in regard to their area, boundaries, locality, possession, and all matters essential to their complete identity. They plead that their plaint, taken in connection with the supplement and Government chittas, is abun-

dantly clear and specific for the purposes of a decree, and contend that non-specification of boundaries of a portion of the lands claimed by them, even if such defect were really imputable to them, ought not to subject them to nonsuit of their whole claim.

JUDGMENT.

On referring to the principal sudder ameen's decision, we find that he has nonsuited the plaintiffs, appellants, on the ground that the plaint is indistinct and deficient in precision, inasmuch as it fails to specify the boundaries of certain resumed lands sought to be recovered, and the names of the villages in which they are situated and of the parties in possession of them ; and also to make those parties defendants in the cause. We cannot, however, view the plaintiffs' suit in the defective light in which it is regarded by the principal sudder ameen ; nor do we see, for the reasons given, the necessity of nonsuiting their whole claim. The amended or supplementary plaint filed by them distinctly specifies the quantity of the resumed lakhiraj land, and refers to the Government chittas, which would seem to indicate their area and boundaries with sufficient accuracy to ensure an eventual execution of judgment. There is no reason, therefore, with this available knowledge before him, why the principal sudder ameen should not have proceeded to the trial of the case, and made an award in settlement of the controversy pending before him. The lands in dispute may be, as alleged by the appellants, susceptible of identification ; and if the parties in possession have not been formally sued by the plaintiffs, the decree, as regards them, will be inoperative, and the plaintiffs be the sufferers. The order of nonsuit, under such circumstances, is clearly wrong. We, therefore, reverse the principal sudder ameen's judgment, and remand the case for trial and a decision on the merits.

THE 28TH MARCH 1859.

A. SCONCE, ESQ., Judge, and E. A. SAMUELLS, ESQ., Officiating Judge.

Petition No. 1823 of 1858.

Application for Special Appeal from the decision of Mr. H. C. Halkett, Judge of Hooghly, dated 28th July 1858, affirming that of Mr. W. T. Taylor, late Officiating Collector of that district, dated 28th April 1853, in the case of

Ramram Ghose, Defendant, Petitioner,
versus

Joykishen Mookerjee, Plaintiff, Opposite Party.

Baboo Taruknath Sein, for Petitioner.

Baboo Kishenkishore Ghose and Baneymadhub Banerjee, for the Opposite Party.

In a suit to resume certain lands, the plea of limitation was raised, and, on trial, was rejected by the judge, on the ground that the grant of the defendant was not valid; but the case is remanded to try simply the existence of the tenure before the 1st December 1790, as the validity of the grant and competency of the grantor are not points relevant to the question of limitation.

Mr. A. Sconce.—This suit was instituted against petitioner to resume beegahs 12-4 held by him rent-free; and, judgment having been given in favor of plaintiff, the defendant adduces three grounds of special appeal.

First, that the zillah judge refused to hear the petitioner's pleader, who had appeared in the former trial of the appeal, and on his behalf, before the case had been remanded by this Court; *second*, that the suit is barred by limitation; and, *third*, that the plaintiff, a dur-putneedar, had not shown his authority from the zemindar to bring this claim for resumption.

Upon the first point petitioner brings before us no evidence to substantiate the plea asserted: and as to the third point, it was definitively determined by this Court on the 20th December 1855. Neither of these points, therefore, is open to special appeal on this occasion. But upon the second point it seems to me the judge has misunderstood the course which, with a view to the lawful determination of the question of limitation, it was incumbent on him to follow. It has been repeatedly held that, supposing a lakhiraj tenure to have existed as such on the 1st December 1790, irrespective of the question of the validity of the grant, a suit brought to resume that tenure is subject to the ordinary law of limitation. In this case, the zillah judge has gone beyond the question of the existence of the tenure. He has held that the defendants have been unable to prove that they, or those whom they represent, *had held the lands in dispute under the sunnud of a duly qualified grantor*, from a period dating before the year 1790. But neither the validity of the tenure, nor the competency of the asserted grantor, is a point material to the question of limitation. The judge has to satisfy himself simply as to the existence of the tenure before the 1st December 1790: and if he finds that the tenure did so exist, plain-

tiff's action must be held barred. Upon this point, therefore, I think the case must again go back to the zillah judge.

Mr. E. A. Samuells.—I concur with Mr. Sconce in remanding the case upon the grounds stated by him. The judge has clearly misunderstood the law as laid down by the majority of the judges of this Court, and must re-investigate the case with reference to the precedents to which Mr. Sconce alludes. I still, however, adhere to the opinion which I expressed in the case of Joykishen Mookerjee *versus* Unnopoorna Dasse, 31st July 1857, that the plaintiff, in suits of this description, is bound to show, without reference to the defendant's title, either that he sues within the ordinary period of limitation, or that he is entitled to claim the benefit of one of the special exceptions to that law.

THE 28TH MARCH 1859.

C. B. TREVOR, Esq., Judge, and H. V. BAYLEY, Esq., Officiating Judge.
Petition No. 1353 of 1858.

Application for Special Appeal from the decision of Captain H. S. Bivar, Principal Assistant Commissioner of Lukhimpore, dated 23rd April 1858, affirming that of Baboo Sindhooram Hazaree, a member of Panchayet stationed at Dibrooghur, dated 21st August 1857, in the case of

Joyhurree Hazaree, Plaintiff,
versus

Mr. H. Harold, Defendant, Petitioner.

Baboos Dwarkanath Mitter and Aushootosh Dhur, for Petitioner, Ex-parte.

IT is hereby certified that the said application is granted on the following grounds.

The plaintiff and defendant entered into an agreement as follows. Plaintiff was to complete a bungalow for defendant; plaintiff was to receive rs. 40 advance, rs. 25 on the thatch being completed, and rs. 25 on the whole bungalow being finished, rs. 90 in all. The plaintiff was to do the work in two months, or pay a fine of 1 rupee a day for each day beyond. Plaintiff admitted the receipt of rs. 50, and sued for 40 as unpaid.

Defendant urged that, on plaintiff's not executing the work according to the terms of the agreement, defendant had had to pay 44-2 for coolies and carpenters to execute it; and that rs. 24 was all that was due to plaintiff, so that defendant had on the whole balance a net demand of rs. 20 against plaintiff.

balance, if any, was due to the contractor, after such deduction and the fine provided for in the agreement.

Case remanded, in order that it might be tried, *firstly*, as to how far the contract for the execution of a certain work had been fulfilled, and thus to what extent the other party was entitled to get the rest done by other hands at the charge of the contractor, and whether such charge was reasonable; and, *next*, as to what

Plaintiff obtained a decree for rs. 40 in the court of first instance; and on the defendant's appeal to the principal assistant commissioner, that officer decreed rs. 40 as the balance due on the agreement, and held that defendant's counter-claim was beyond its terms, and not proved.

Defendant appeals specially, urging, that the lower appellate court has not considered what amount of work was executed, and thus what sum was due under the agreement.

We consider that in this case the points to be decided were, firstly, whether plaintiff had executed what, and within the time, under the terms of the agreement he had agreed to, and if not, then whether defendant was not justified in employing other persons to execute that work; and if so, whether the amount defendant might prove he had expended for that purpose was reasonable and fair; and then, whether such expense being deducted, and also any fine to which plaintiff was liable under the agreement, plaintiff was entitled to any and what balance.

We remand the case to be re-tried with reference to the above remarks.

THE 28TH MARCH 1859.

C. B. TREVOR, Esq., Judge, and H. V. BAYLEY, Esq., Officiating Judge.

Petition No. 959 of 1858.

Application for Special Appeal from the decision of Mr. F. B. Kemp, Judge of Backergunge, dated 2nd March 1858, reversing that of Baboo Nobinkishen Paulit, Principal Sudder Ameen of that district, dated 14th July 1858, in the case of

Reazoodeen, Plaintiff, Petitioner,

versus

Moolayee Khan, Defendant, Opposite Party.

Moulvee Syud Murhumut Hossein and Baboo Unookoolchunder Mookerjee, for Petitioner.

Baboo Dwarkanath Mitter, for the Opposite Party.

Case remitted to the judge, in order that he may remand it to the principal sudder ameen

It is hereby certified that the said application is granted on the following grounds.

Reazoodeen, plaintiff, respondent, sued the defendant for enhancement of rent upon 3d.-2k. of land after service of notice.

for re-investigation on the real issues raised in the pleadings, which are—

1st. Whether the howaladaree tenure of defendant covers Gribhooshun's share of the onsut talook alone, or both the shares of Gribhooshun and Shusheebhooshun?

2nd. If the former, then is plaintiff's present claim conformable with law?

3rd. If the latter, then, looking to the terms of the howaladaree pottah, both as to measurement and subsequent assessment, is the claim sustainable or not?

Plaintiff alleges that he obtained a neem-ousut talook from Shusheebhooshun, the owner of 8 annas of the ousut talook, in 1261 B. ; that the defendant was in possession under an alleged howaladaree tenure ; that having measured the land, and finding 6*d*.-4*k*. in defendant's possession, he now sues for enhancement of the rents upon the 8 annas of the talook granted to him by Shusheebhooshun.

The defendant pleads his howaladaree talook and the right under it, but does not clearly state, though upon the plaintiff's pleading he was called upon clearly and fully to declare his title, from whom he acquired it. It is clear that plaintiff denies the valid existence of the howaladaree tenure over the 8 annas of the property granted to him by Shusheebhooshun ; and it is equally clear that the grant of the howaladaree pottah was ostensibly made to defendant by Grisbhooshun alone. Under these circumstances the real issues in the case were—

1*st*. Did the howaladaree tenure of defendant cover Grisbhooshun's share of the ousut talook alone, or both the shares of Grisbhooshun and Shusheebhooshun ?

2*nd*. If the former, then is plaintiff's present claim conformable with law ?

3*rd*. If the latter, then, looking to the terms of the howaladaree pottah, both as to measurement and subsequent assessment, is the claim sustainable or not ?

The decisions of the principal sudder ameen and the judge seem to us on the first point to be altogether defective. We, therefore, remit the record to the judge, with directions that he will remand it to the principal sudder ameen for re-investigation upon the issues above noted.

THE 29TH MARCH 1859.

A. SCONCE, ESQ., Judge, and H. V. BAYLEY, ESQ., Officiating Judge.

Petition No. 1907 of 1858.

Application for Special Appeal from the decision of Baboo Dwarkanath Roy, Principal Sudder Ameen of Tipperah, dated 6th September 1858, affirming that of Moulvee Reazoo-deen, Moonsiff of Noornuggur, dated 26th December 1857, in the case of

Rajkishen Rae, Plaintiff, Petitioner,
versus

Dewan Munooowur Alee and others, Defendants, Opposite Party.
Mr. R. T. Allan and Baboo Kishenkishore Ghose, for Plaintiff. Baboos Unookoolchunder Mookerjee and Unnodapersad Banerjee, for Defendants.

Held, that, if a court, by virtue of the authority conveyed in Section XXXV. Act XIX. of 1853, direct a party to be summoned as a witness, the process of service and obligation incident to the service of the summons follow the rules laid down in Section XXIV. But, in this case, the order of the principal sudder ameen is set aside, as the expenses requisite for attendance of witness were not supplied.

PETITIONER instituted this suit to recover possession of certain land. The moonsiff dismissed the suit on the merits. Petitioner appealed; and, pending appeal, the principal sudder ameen summoned plaintiff, appellant, to appear and be examined as a witness, and plaintiff failing to appear, the principal sudder ameen dismissed the appeal under Section XXIV. Act XIX. of 1853.

Two points are raised in special appeal. *First*, that, as the principal sudder ameen of his own motion summoned petitioner as a witness under Section XXXV. Act XIX. of 1853, the penalty for non-attendance exercisable under Section XXIV. cannot be enforced. But we would observe that Section XXXV. creates simply the power to summon without referring to the process by which the summons is to be served; and that necessarily the process of service and the obligation incident to the service follow the rules prescribed in the earlier section of the Act. Upon this point, therefore, the application of petitioner is inadmissible.

But, in the *second* place, it is urged, in conformity with the ruling of this Court, reported at page 342 of the Decisions of 1858, that the service of summons was legally incomplete, inasmuch as the principal sudder ameen failed to furnish the petitioner with the expenses requisite for his attendance. We observe that the case was tried by the principal sudder ameen of Tipperah, and that the petitioner was summoned in the district of Moorshedabad. If the principal sudder ameen should still think, considering the distance of the two districts, that the personal attendance of petitioner is essential, he must be guided by the decision quoted: but as the matter now stands, we must set aside the judgment pronounced, and the case must be remanded for re-trial.

THE 30TH MARCH 1859.

H. T. RAIKES and J. H. PATTON, ESQS., Judges, and G. LOCH, ESQ.,
Officiating Judge.

*Regular Appeals from the decision of Baboo Pearceemohun
Banerjee, Principal Sudder Ameen of Beerbhoom, dated 11th
February 1857.*

Case No. 392 of 1857.

Heetlal Misser, (one of the Defendants,) *Appellant,*
versus

Beenudram Sein and others, (Plaintiffs,) and others, (Defendants,)
Respondents.

*Baboos Ramapersad Roy and Kishenkishore Ghose and Mr. R. T.
Allan, for Appellant.*

Baboo Jugudanund Mookerjee, for Respondents.

Appeal valued at Rs. 8262-10.

Case No. 394 of 1857.

Takoorlal Gossain, (one of the Defendants,) *Appellant,*
versus

Beenudram Sein and others, (Plaintiffs,) and others, (Defendants,)
Respondents.

Baboos Bhoobunmohun Roy and Sreekunt Singh, for Appellant.

Baboo Jugudanund Mookerjee, for Respondents.

Appeal valued for costs at Rs. 327-3-9.

Case No. 395 of 1857.

Shamlal Gossain, (one of the Defendants,) *Appellant,*
versus

Beenudram Sein and others, (Plaintiffs,) and others, (Defendants,)
Respondents.

Baboos Bhoobunmohun Roy and Sreekunt Singh, for Appellant.

Baboo Jugudanund Mookerjee, for Respondents.

Appeal valued for costs at Rs. 323-11a.-9g.

Case No. 396 of 1857.

Rookeenee Koomaree Debea, (one of the Defendants,) *Appellant,*
versus

Beenudram Sein and others, (Plaintiffs,) and others, (Defendants,)
Respondents.

Baboos Bhoobunmohun Roy and Sreekunt Singh, for Appellant.

Baboo Jugudanund Mookerjee, for Respondents.

Appeal valued for costs at Rs. 323-11a.-9g.

Case No. 408 of 1857,

Beenudram Sein and others, (Plaintiffs,) *Appellants,*
versus

Heetlal Misser and others, (Defendants,) *Respondents.*

Baboos Jugudanund Mookerjee and Sreekunt Singh, for Appellant.

Baboos Ramapersad Roy and Kishenkishore Ghose and Mr. R. T. Allan, for Respondents.

Appeal valued at Rs. 8262-10.

In a suit by a purchaser at execution sale against the decree-holder, for possession of a share of estate, in which he had bought the rights and interests of the judgment debtor, less certain alienations made prior to notice of sale by deeds, which were not shown to be other than genuine, plaintiff was unable to show what his purchase comprised: to no decree, therefore, for the same, could effect be given. Order of lower court reversed.

THE plaintiff, in this suit, sued for possession of 4-annas share of Ryepore, on the averment that he purchased, at a public sale in satisfaction of a decree passed in favor of Heetlal Misser, the share of Shamlal Misser, in the above village, comprising 4 annas. The defence set up was, that the plaintiff had purchased the rights and interests of the said Shamlal in the 4-annas share of the village of Ryepore, with the exception, as intimated in the sale notice, of all alienations made, previous to issue of the notice, by the said Shamlal; that some of these alienations, as evidenced by certain deeds pleaded, had been made both by Shamlal and his ancestors, in favor of Heetlal's predecessors, or of persons from whom Heetlal had acquired them, which lands Heetlal now held, together with Shamlal's share in 56 beegahs, sold in execution of the same decree under which plaintiff claimed, but purchased by Heetlal, a few months previous to plaintiff's acquired rights. These several alienations, it was asserted, had reduced the interests of Shamlal in Ryepore, at the time of plaintiff's purchase, to the receipt of rent amounting to 4 rupees 8 annas, which was all plaintiff could be entitled to receive.

The principal sudder ameen refused to recognise the validity of two deeds of gift said to have been executed by Shamlal on 30th Assar 1240 and 8th Jeyt 1258 respectively, for 9 beegahs 16 cottahs, and decreed to plaintiff possession of this quantity, and generally of Shamlal's rights and interests in 4-annas share of Ryepore.

From this decision five appeals have been preferred: one by plaintiff, for the rest of the lands excluded by the lower court; one by Heetlal, the principal defendant, for the 9 beegahs 16 cottahs decreed to plaintiff; and three by the three other defendants, for their costs, which the principal sudder ameen has laid upon them. It is however only necessary to give the details of the case, as submitted to us by plaintiff's pleader in reference to his client's claim for the lands of Ryepore not decreed to him, and his arguments as upholding plaintiff's right to the 9 beegahs and 16 cottahs decreed to him, but the right to which the defendant Heetlal disputes in appeal.

Plaintiff's pleader informs us that the village of Ryepore was originally held by Mohunlal and Brijolal in equal shares. Of these two brothers, Shamlal is the direct descendant of Mohunlal, who had two sons, Junglal and Anundolal, Shamlal being the son of Junglal.

As Mohunlal and Brijolal separated and divided their shares in Ryepore in 1178, Mohunlal took 8 annas, to which his sons Junglal and Anundolal succeeded; and then, on the death of Junglal, Shamlal his son took the 4 annas appertaining to his father.

Brijolal, the other brother, holding his 8-annas of the village, was succeeded by his son Shitublal, who had three sons, Kreealal, Ajeetlal, and Beenod, the last dying without issue, while Kreealal was succeeded by his three sons, now represented in this case by Thakoorlal and Rokinee, the widow of another, and Ajeetlal's rights were inherited by his daughter's son, Heetlal, the principal defendant of the suit.

The plaintiff's pleader assumes from this genealogy, that Shamlal having succeeded his father Junglal, he came into possession of his father's share or 4-annas of the village; that, as his client procured a sale certificate of Shamlal's share on the 21st August 1855, he is entitled to possession of 4 annas; and that, as the village is estimated to comprise 2900 beegahs, his client should be awarded one-fourth thereof or 725 beegahs. The defendants, however, have opposed him, setting up various deeds as evidence of alienations made by Shamlal and his predecessors; and as these deeds are believed to be spurious, his client seeks by this appeal to set them aside. They consist of a deed of sale dated 21st Pous 1203 B. S., purporting to have been executed by the two sons of Mohunlal, Junglal, and Anundolal, in favor of Shitublal, conveying to him the entire 8 annas held by them in Lall Bazar, as forming a distinct part of the village of Ryepore. Shitublal then, it is asserted, joined to this portion his own 8-annas share of Lall Bazar, and devoted the whole to idol worship, constituting his own three sons the shevairs or superintendents of the trust, and in this way their representatives assert the right of holding the whole of Lall Bazar. The pleader then states that, while Heetlal declares he acquired the entire rights of Anundolal, Shamlal succeeded to his father Junglal's 4-annas share in the village, but that Junglal had sold in 1241 his share in the family domicile to Ajeetlal, Heetlal's grandfather, and that in 1240 Junglal had bestowed upon his mistress, Tarinee Bewa, 4 beegahs 4 cottahs devoted to idol worship; that in 1225 he disposed of by deed, dated 1st Assar, 15 cottahs to Punahlal, whose mother, after Punahlal's death, sold it in 1234 to Heetlal's mother; that Junglal had also bestowed 8 cottahs of land in 1225, by deed of gift, to Soonderlal, who sold the same to Heetlal's mother in 1235, and Shamlal himself had given him (Heetlal) 5 beegahs

12 cottahs on 8th Jeyt 1258; that, in addition to the deeds which represented these alienations, and which plaintiff disputed, Heetlal had purchased at public sale the share of Shamlal in 56 beegahs 17½ cottahs, on the 29th June 1855, which plaintiff's pleader did not now contend for.

On the other side, it is contended by the pleader for Heetlal, that the several alienations adverted to by the plaintiff are covered by deeds executed either by Shamlal's predecessors or by Shamlal himself, and that they are all of dates long previous to the sale at which plaintiff acquired his rights; that at that sale plaintiff purchased the rights and interests remaining to Shamlal in the 4-annas share of Ryepore, with the exception of alienations previously existing; that it is for plaintiff to point out and show of what those interests then consisted, or to establish that, previous to the sale, Shamlal was in possession of some or all of these lands which plaintiff seeks to get possession of; that until the plaintiff can show a *prima facie* case for himself, founded on the fact of Shamlal's possession at the time of sale, or just previous thereto, the plaintiff cannot be said to have made out such a case as requires the defendants in possession to prove the title under which they hold; that plaintiff's evidence consists of the sale certificate he procured on the 21st August 1855, which, of course, proves nothing as to the lands sold, and the depositions of five witnesses, who do not pretend to say that Shamlal held possession at any time of 725 beegahs in Ryepore, but merely that, when plaintiff with his sale certificate went to take possession, he was opposed by defendant and others, and could not get possession of the lands he wanted. The pleader, therefore, argues, that the lower court was wrong to enter on the validity of the deeds adduced by the defendants, as plaintiff had failed entirely to make out such a *prima facie* case as justified the court below in deciding on the merits of the defendant's title.

JUDGMENT.

There is much weight in these arguments of the pleader for the defendant Heetlal. It may be that, plaintiff having purchased the rights and interests of Shamlal in the village of Ryepore, those interests were at one time a 4-annas share of the village. But the question plaintiff has raised by this action is not what Shamlal came into when he succeeded his father Junglal, but what he actually possessed of his patrimony when sold up on the 21st August 1855. Nothing, therefore, in favor of plaintiff's case can be derived from the admission that Junglal succeeded to a 4-annas of the village, and on his death Shamlal nominally took the same share. We agree with defendant's pleader, that plaintiff should have established that Shamlal held possession of something in

Ryepore at the time of sale, and it would then have been incumbent on a party advancing an adverse right thereto to prove that his right was preferential to that acquired by the purchaser. But in this case no ground of the sort has been ever pleaded by the plaintiff to start his case upon; and we therefore see no reason to interfere with the lower court's order in regard to that part of the claim which the principal sudder ameen rejected.

It remains to consider whether the decree can be allowed to stand as respects the 9 beegahs 16 cottahs, and the general intimation that plaintiff is entitled to the rights and interests held by Shamlal in 4 annas of Ryepore.

The principal sudder ameen has held these deeds relating to the 9 beegahs and 16 cottahs to be collusive deeds, because the defendant, Heetlal, who, as decreedar, had applied for the sale of the rights and interests of Shamlal, had not applied to the court previous to sale to prevent their passing to the purchaser under the sale. But these reasons are manifestly insufficient for any such conclusion. Heetlal, who applied for the sale, had in his petition specially requested that the advertisement should except all previous alienations on the part of Shamlal; and this exception must be held to apply to such alienations as affected either his own rights or those of others in the same position, and therefore no necessity could apparently exist for Heetlal's coming forward with objections, and no argument can arise from his omitting to do so.

These deeds, therefore, must be classed with those other deeds as holding good, unless some *prima facie* case is made out by the plaintiff inconsistent with their integrity. This has not been done, as we have already observed, and therefore the principal sudder ameen's decision rejecting them must be set aside.

On the part of the decree, which is simply declaratory of plaintiff's being entitled to the rights and interests of Shamlal in 4-annas of the village, no effect can be given to it, until it is shown what those interests really comprise. This has been the object of plaintiff in this suit, but he has failed to effect it in a manner satisfactory to the Court.

The order, therefore, is, that plaintiff's appeal is dismissed, and the defendant Heetlal's appeal is decreed, and that the other defendants who have appealed for their own costs will receive them. The costs of all these appeals on the plaintiff.

THE 30TH MARCH 1859.

A. SCONCE and C. B. TREVOR, ESQS., Judges, and H. V. BAYLEY, ESQ.,
Officiating Judge.

Regular Appeals from the decisions of Baboo Panchann Bannarjee, Principal Sudder Ameen of Rajshahye, dated 25th July 1856.

Case No. 26 of 1857.

Ranee Sheosoonderee Debea, (Defendant,) *Appellant*,
versus

Mr. D. Rimon, (Plaintiff,) and others, (Defendants,) *Respondents*.
Baboos Shumbhoonath Pundit and Kishenkishore Ghose and Mr. J. W. B. Money, for Appellant.

Suit laid at Company's Rupees 18,696-4-3.

Case No. 27 of 1857.

Ranee Sheosoonderee Debea, (Plaintiff,) *Appellant*,
versus

Ranee Soorujmonee Debea and others, (Defendants,) *Respondents*.
Baboos Shumbhoonath Pundit and Kishenkishore Ghose, for Appellant.
Baboo Ramapersad Roy and Moonshree Ameer Alee, for Respondents.

Suit laid at Company's Rupees 21,000.

Two suits have been instituted, one by A for possession of certain lands decreed to B under Act IV. of 1840, another by B for a reversal of a survey proceeding drawn up subsequently to the decision under Act IV. of 1840, including the lands within A's estate. RANEE SHEOSOONDEREE DEBEA, wife of Rajah Anundnath Roy, sued Ranee Soorujmonee and others, for the reversal of the proceedings of the survey authorities defining the boundaries of mehal Telkoopee.

Plaintiff alleges that, in execution of a decree of the Sudder Court, obtained by Ranee Sursuttee against Bhyrubindernarain, debtor, for the realisation of the amount decreed, the rights and interests of the debtor in mehal Telkoopee, to the extent of 14-annas share, are being sold.

The principal sudder ameen, looking upon B's case first, determined that he had not proved that the land entered in the thakbust as belonging to A was within his estate. He, therefore, dismissed B's case, and, as a necessary consequence, decreed that instituted by A.

Held, on appeal, that as B was in possession under the order of the criminal courts acting under Act IV. of 1840, in other words, under the order of a court of competent jurisdiction, and as the order of the survey authorities was subsequent in point of date to that of the magistrate and session judge, his possession should have been upheld until A showed a title superior to his; that, consequently, A's case should have been taken up first, and B's have followed the result of it; and the principal sudder ameen in acting otherwise has erred in his mode of disposal of the cases before him.

Held, also, that the evidence produced by A is totally insufficient to warrant the court's entering into any enquiry of B's title.

The decision of the lower court in A's suit is reversed, and in B's suit, also, that decision is reversed, and B is declared entitled to have the lands in dispute demarcated as belonging to turuf Telkoopee. The costs of both courts to be borne by A.

were put up to auction and purchased by her on the 17th November 1848, corresponding with 3rd Aughrun 1253 ; that after obtaining the deed of sale, she, on the 25th May 1849, was put in possession of the same, but that in the survey of the aforesaid mehal, which took place during the interval between the auction sale and plaintiff's obtaining possession, the aforesaid debtor and his co-sharer, with a view to disturb her (purchaser's) right, and to extend the area of other talooks belonging to themselves, fraudulently caused certain lands of Telkopee to be excluded from the survey of that mehal ; that, on being apprised of the fact, she, plaintiff, represented the fraud to the superintendent of survey, who referred the matter to the deputy collector ; that the deputy collector on the 17th April 1851 rejected her application, on which she appealed to the superintendent, who ordered the case to be struck off the file without enquiry ; that before the issuing of the order of the deputy collector of survey, and after plaintiff's obtaining possession of her rights purchased at auction, Rajah Hurindronarain, one of the co-sharers of Amhuttee, in pergunnah Luskerpore, objected to her taking possession of some of the lands purchased by him, and brought a suit under Act IV. of 1840 ; that on the 30th April 1850 the deputy magistrate of Nattore, without enquiry into plaintiff's rights, ordered possession of the disputed land to be given to Rajah Hurindronarain Roy ; that on appeal, however, on the 28th May 1850, the session judge ordered the disputed lands to be placed in the plaintiff's possession ; that though the plaintiff is now in possession of the land as a portion of the purchased mehal Telkopee, still a certain portion of the lands of that mehal are excluded from the survey of that property : she, plaintiff, therefore brings the present suit to set aside the proceeding of the survey authorities, and to have her declared entitled as proprietor of Telkopee to the land in dispute.

The defendants, sharers of different portions of turuf Amhuttee, plead in their answers, that the boundary laid down by the survey is correct ; that the land now claimed by plaintiff is within Amhuttee ; and that suits have been instituted by them to set aside the order of the session judge passed under Act IV. of 1840, awarding possession to the plaintiff : they pray, therefore, that plaintiff's suit may be dismissed, with costs.

Before stating the result at which the principal sudder ameen arrived in the case, it will be well to notice the second suit before us in appeal.

On the 28th September 1853, Mr. Dalrymple, as farmer of a 4 annas 13-1-1 share of pergunnah Luskerpore, from the Court of Wards, into whose hands the property had come by reason of the minority of Prusonarain Roy and others, sons of the late Bhopindronarain Roy and others, sued for their 7-annas share in certain lands

of bheel Chundrabuttee, situated in mehals Amhuttee, Shampore, and Punditgram, of which they had been dispossessed by the operation of certain orders passed under Act IV. of 1840.

The plaintiff in this case alleged that he and Mr. G. French conjointly took a farm of 4 annas 13-1-1 share of pergunnah Luskerpore from the Court of Wards, for the term of seven years, commencing from 1254 to 1260, at an annual jumma of rs. 957-1a.; that subsequently Mr. French resigned his share of his farm to petitioner, who thereby became sole possessor of the farm; that he subsequently sub-let some of the mehal of Noorpore Malanchee and turuf Amhuttee, first to Mr. French and afterwards to Messrs. Smith, Huffnagle, and Co., who held possession of the same; that the bhuruttee lands of bheel Chundrabuttee, appertaining to the estate of turuf Amhuttee, have always been held as component parts of mehals Amhuttee, Shampore, and Punditgram, to which the accretion had formed; that a 7-annas share of those mehals belonged to the zemindaree of the aforesaid minors; that whilst Messrs. Smith, Huffnagle, and Co. were in possession, one Issanchunder Mozoomdar, executor on behalf of the minors, and in possession as such of the shares of estates belonging to them not brought under the Court of Wards, and alleging that 1600 beegahs of the said bheel lands was in talook Telkoopee, engaged in an Act IV. case with Messrs. Smith, Huffnagle, and Co.; that the deputy magistrate, on the 20th March 1848, ordered the lands to be replaced in the possession of Messrs. Smith, Huffnagle, and Co. as a portion of turuf Amhuttee, but on appeal to the session judge, that officer, on the assumption that the lands had for four months been in the possession of the executor, four months after the date of the institution of the suit remanded the case to the deputy magistrate for re-enquiry; that that officer then found that possession had been with the executor since the month of Assin last past, and ordered him to be placed in possession; that under color of the aforesaid award the executor ousted him of possession of 1516 over and above the 1600 beegahs of which he had previously dispossessed him; that thus he was altogether dispossessed of his share in 3116 beegahs of land; and as possession of the same cannot be recovered, save by a civil suit, he brings the present action, valuing his suit at the value of the land.

The different defendants, including Sheesoonderee Debea, the plaintiff in the first suit, deny that possession of the lands claimed was ever with the zemindar of turuf Amhuttee, and assert that they, together with the other lands of the bheel Chundrabuttee, appertain to turuf Telkoopee, and have always been in possession of the zemindar as such, and that they of right belong to Telkoopee.

These two cases, as well as two others, instituted on behalf of other sharers of turuf Amhuttee, to reverse the decisions of the deputy

magistrate and session judge, passed under Act IV. of 1840, which are not now before this Court, were before the principal sudder ameen at one and the same time. He first enquired into the merits of the case in which Sheosoonderee Debea was plaintiff, and was of opinion that her claim to have the survey boundary of Telkoopee reversed was unfounded for the following reasons. *First*, inasmuch as plaintiff was unable to prove, either by papers of the decennial settlement, or public revenue records, that bheel Chundrabuttee forms a portion of Telkoopee; whereas it appears, on referring to a decision passed in a case instituted under Regulation II. of 1819, for the resumption of bheel bhurut lands, dated the 28th February 1835, that the collector reported that the 1100 beegahs of land sued to be resumed were possessed by Ranee Soorujmonee and others as being in turuf Amhuttee, and a representation made by the mujmool nuvees reports that, on inspection of the collector's records and the deheebundee papers of 1198, it is evident that bheel Chundrabuttee and kismut Amhuttee, &c., appertain to pergunnah Luskerpore; and from a personal survey made by the collector in question, it appeared that bheel Chundrabuttee was surrounded by villages of pergunnahs Luskerpore; Dijla, and Rajshahye; and the settlement of pergunnah Luskerpore was made in three separate dools, including therein bheel, jheel, and other such lands; that the julkur jumma of rs. 8½ of bheel Chundrabuttee was included in that of pergunnah Luskerpore; hence the claim of the zemindar of Luskerpore to the lands was considered to have been made out, and the claim of Government to resume the lands was dismissed. *Second*, inasmuch as, if bheel Chundrabuttee had been included in the settlement and thakbust of Telkoopee, some mention of it would have been made in the nazir's or mujmool nuvees's report as such. *Third*, inasmuch as the statement made by Soorujmonee, Moheshnarain Roy, and others, in their answers in the Regulation II. of 1819 suit, to the effect that the lands of Chundrabuttee were within Telkoopee, was merely a false plea to get rid, by some means, of the claim of Government. *Fourth*, inasmuch as it would appear from the canoongoe map of Telkoopee, prepared in 1234, that that village is surrounded entirely by Punditgram, and the survey map has been made entirely in consonance with the boundaries so laid down. *Fifth*, inasmuch as, though bheel Chundrabuttee is mentioned in the partition papers of 1228 of a 5½-annas share of turuf Amhuttee, still, as the lands of the bheel were not capable of being divided, the mere fact of the non-mention of the bheel is no proof that it was within turuf Telkoopee. *Sixth*, inasmuch as, from the depositions of witnesses taken in the Regulation II. of 1819 case, which have been filed on the present record, it cannot be shown that the bheel Chundrabuttee is within mehal Telkoopee.

The principal sudder ameen for the above reasons dismissed the plaintiff's suit, with costs, and he, as a consequence, decreed the three other cases which were before him, instituted by different sharers in Amhuttee, for possession of the land decreed to Ranee Sheosoonderee Debea as a portion of Telkoopee, with costs.

JUDGMENT.

Two appeals have now been preferred against the decision of the court below by Ranee Sheosoonderee Debea, one against the decision passed adversely to her in the case in which she was plaintiff, and the other in that in which Mr. Dalrymple was plaintiff and she was defendant. Her appeal is upon the whole merits of the two cases, and her vakeels have urged, in the first place, that the principal sudder ameen has been entirely in error in investigating first of all her suit to reverse the thakbust, and then allowing the suits for possession brought against her by different parties to follow the result of the first suit; that as she had obtained possession of the land in dispute, by an order passed under Act IV. of 1840, she was in possession under the order of a competent court, and that she should be retained in possession until the other parties had shown a title better than her own; that, consequently, Mr. Dalrymple should have been called upon to show his title in the case in which he sued for possession first of all, and the suit for reversal of thakbust, which had unnecessarily been brought by the ranee, should have followed the result of the other case; that by the course of conduct followed by the principal sudder ameen, the burden of proof has been thrown upon their client, while it ought to have been on the other party; and that, by this error on the part of the principal sudder ameen, the suit of Mr. Dalrymple has been decreed when it should have been dismissed.

In answer to these objections as to the mode in which the case had been heard below, a suggestion was made by Baboo Ramapersad Roy, that the order passed under Act IV. of 1840 by the criminal authorities was not the order of a competent court; for that a previous case under Act IV. of 1840 had been instituted in 1846 for the said land, and possession of it had been awarded as a portion of Amhuttee. On enquiry for this proceeding it appeared that it was not on the record, and it became consequently unnecessary to consider what might have been the position of the parties before the Court, had the suggestion thrown out by the Government pleader turned out to be correct. Under the circumstances which actually appear, the Court has no doubt that the principal sudder ameen has erred in his mode of disposal of the cases before him. The decisions under Act IV. of 1840 were passed in 1849, those by the survey authorities in 1851. Now the orders of the criminal authorities were the orders

of competent courts ; and it was not competent to the survey authorities to act subsequently in opposition to them, or in fact in any other way than by looking to simple possession. Such being the case, and the order of a competent authority having given possession to the defendant, Rancee Sheesoonderee Debea, it was incumbent on the plaintiff, Mr. Dalrymple, ere her possession could be touched, to show a title superior to hers.

Looking, then, first to the case in which Mr. Dalrymple is a plaintiff, the issue in it is simply whether the land sued for, amounting to 3116 beegahs, belongs to certain villages of turuf Amhuttee, pergunnah Luskerpore, or to the mehal of Telkopee, within pergunnah Amrool.

These two estates, though situated in different pergunnahs, belonged to the same zemindar up to the time when Rancee Sheesoonderee Debea purchased the right and interest of Baboo Bhyrubindernarain Roy in turuf Telkopee, in execution of a decree against him. It is necessary, therefore, in determining to which estate the lands in dispute appertain, considering their nature, which is that of the dried up land of a large bheel surrounded by various estates, to look not only to the old papers regarding the estate, but also to any document or declaration by which it can be gathered to which estate, in the opinion of the owner of both properties, the land in dispute has up to a recent date belonged.

For the purpose of proving his allegation, the plaintiff Dalrymple has relied mainly, if not entirely, upon a decision passed under Regulation II. of 1819, by the collector of Rajshahye on the 28th February 1838, corresponding with 18th Falgoon 1241 B. E. It will be well, therefore, to give the particulars of that decision. The claim of Government was for the assessment of 1200 beegahs of land lately dried up within bheel Chundrabuttee. "On referring to the map and having inspected the locality, I find," writes the collector, "that on the four sides of the lands under dispute are situated the villages of Amhuttee, Punditgram, Rawoozbagh *alias* Hareegalla and Lutchapole of pergunnah Luskerpore, mouzahs Kajee Belgarreah, Nusrutpore, Degha Augdeggha, Chatour, Hareegatcha and Lutchapole of pergunnah Degha, and also Gobindpore and tuppa Jheelum of pergunnah Rajshahye. Further, on examining the dowl and kuboolyut of the decennial settlement of pergunnahs Rajshahye, &c., and of the three shares of pergunnah Luskerpore, &c., that is to say, 1½-annas, 7-annas, and 3½-annas shares, forwarded by the mhjmoool nuvees of the collectorate, I was satisfied that the settlement of pergunnah Rajshahye, &c., was concluded with Rajah Ramkishan Roy Bahadoor under a single dowl, and that of pergunnah Luskerpore, &c., with the ancestor of defendant in this case under three dows, without specification of villages and kismuts, as

well as bheels and jheels contained in the two zemindarees according to the boundaries thereof. Hence under the law in force the assessment of rent on mal lands appears to me to be unjust and irregular. From the dowl and other documents of the decennial settlement, referred to in the report of the mujmool nuvees and extant in the records of this office, there appears no trace of the exemption of this bheel, or the lands covered by water, from the settlement. On the contrary, the inclusion of a julkur jumma of 8-2, in the bheel under dispute, the lands of which, on the drying up of the water, belonged to the landholder, is clear from the records of the decennial settlement." After a few more remarks of no moment, the collector dismissed the Government claim.

It is urged on the part of the plaintiff, respondent, that, as both parties have filed the proceeding under Regulation II. of 1819, they must take it in its totality ; that the absence of all mention of turuf Telkopee or pergunnah Amrool in the decision is fatal to the defendant's claim, whilst the mention of Amhuttee and pergunnah Luskerpore leaves no question as to the relative rights of the parties in suit to the lands of bheel Chundrabuttee as a portion of the decennial settled estate belonging to them respectively ; that, moreover, the absence of all mention of Chundrabuttee in the canoon-goe's map of Telkopee, in 1234, for the original book containing which the principal sudder ameen sent, is strong against the defendant ; that map shows that Telkopee is surrounded by Punditgram ; that, added to these documents showing the plaintiff's title, the evidence of subsequent possession under that title is so cogent as to imperatively demand a verdict at the hands of the Court.

On the part of the defendant, respondent, it is contended that the decision of the deputy collector was passed in a matter in which the only contest was the right of Government to resume or not ; that the rights of parties as against Government claiming to resume were consequently settled by it ; but the right of parties *inter se*, as claimants to the lands, was not within the jurisdiction of the collector ; that, nevertheless, the answers put in by the different zemindars, as being *bond fide*, *inter se*, are of great weight ; that in her answer filed in 1835, that is, fourteen years before defendant's purchase, which was made in 1848, Ranee Soorujmonee, the very person then in possession of the share now farmed to the plaintiff, declared that the lands of Chundrabuttee, to assess which the claim was made, were situated in Telkopee ; that Ranee Soorujmonee being a sharer both in Amhuttee and Telkopee, could have had no objection in saying it was with one rather than with the other estate ; that, consequently, her statement is of the greatest importance ; that, looking to the decision of the collector, if plaintiff relied upon every statement in it, he should have produced the nazir's and the mujmool nuvees's reports, and copies of the decennial settlement

papers, and not having done so, this Court will not take the assertions in their reports, be they what they may, as proved ; that altogether plaintiff has produced no evidence of her right warranting the interference of the Court.

The proceeding of the collector, of which an abstract has been given above, may develop sufficient reasons for releasing from resumption the dried up lands of bheel Chundrabuttee, but it, taken in its totality, as urged by the appellant before us, certainly affords no certain grounds for enabling the Court to determine whether the lands in dispute belong to Telkopee or Amhuttee ; the former is in pergunnah Amrool, the latter in pergunnah Luskerpore, and both these pergunnahs would seem at the decennial settlement to have been in the possession of the Potteah family, as pergunnah Rajshahye was in the Nattore. Such being the case, the three dows alluded to by the collector, under which pergunnah Luskerpore, &c., was settled with the zemindar, the ancestor of the minor, whose farmer the plaintiff is, may have included, and probably did include, pergunnah Amrool, and consequently turuf Telkopee, as well as turuf Amhuttee : and if so, the decision of the collector under Regulation II. of 1819 is just as good a document for Sheesoonderee Debea as for Mr. Dalrymple, and in no way assists the relative rights of the parties before the Court.

In this uncertainty caused by the improper use of the word *et-cætera* this decision must undoubtedly be set aside, as in itself of no weight in determining the controversy before the Court, though even if it had been explicit on the subject of the particular pergunnahs included in the dowl of the decennial settlement, it is difficult to see how, in a suit like the present, it could be conclusive evidence, though doubtless entitled to considerable weight. What other evidence have we there then to show the title of the plaintiff to the lands in dispute—none whatever. Evidence of possession has been given, and even admitting it is worthy of some consideration, it is, unless supported by evidence of right, totally insufficient to warrant the disturbance by the Court of the possession of the defendant Ranee Sheesoonderee Debea, acquired under the order of a competent authority.

Such being the view adopted by us, the case might stop here ; but omitting all notice of the conduct of different sharers in turuf Amhuttee and turuf Telkopee at the present time, we cannot help noticing the very remarkable fact that Ranee Soorujmonee, fourteen years before the purchase by the present defendant, Ranee Sheesoonderee Debea, of her present interest in turuf Telkopee, in her answer, in the resumption suit of 1835, declared that the lands of the bheel, for which that suit was instituted, formed a portion of turuf Telkopee, and not of turuf Amhuttee.

Altogether, looking only to the evidence produced by the plaintiff, we do not think that it is sufficient to warrant our entering upon the enquiry into the defendant's title; and as plaintiff has thus altogether failed in his suit for possession of the land decreed to defendant under the order of the criminal court, acting under Act IV. of 1840, nothing remains for us but to reverse the decision of the lower court, and to decree the appeal of the defendant, appellant, with costs of both courts to be paid by the plaintiff, respondent.

Having determined that the evidence is insufficient to disturb the defendant's title in the first suit, it follows that in the suit brought by that defendant to alter the survey map in accordance with her right, she must be successful. We, therefore, in this suit also reverse the order of the court below, and declare the plaintiff's right to have the lands in dispute demarcated as belonging to turuf Telkopee. The costs of both courts, in this suit, to be borne by defendants, respondents.

THE 30TH MARCH 1859.

A. SCONCE and C.B. TREVOR, ESQs., Judges, and H. V. BAYLEY, ESQ.,
Officiating Judge.

Case No. 605 of 1856.

*Regular Appeal from the decision of Baboo Dwarkanath Roy,
Principal Sudder Ameen of Tipperah, dated 24th June 1856.*

Musst. Fatima Begum, (Plaintiff,) *Appellant,*
versus

Mirza Mahomed Jaffer Khan and others, (Defendants,) *Respondents.*
Moonshes Ameer Alee and Baboo Kishenkishore Ghose, for
Appellant.

Baboos Ramapersad Roy, Ramgopal Ghose, and Gopal Lal
Mitter, and Mr. R. Norris, for Respondents.

Suit laid at Company's Rupees 5828-3a.-18k.

Plaintiff sued certain defendants to set aside a deed of gift, alleged to have been executed by her, pleading that it was a forgery, and executed by other parties without her knowledge and consent, though probably for her benefit.

PLAINTIFF, Mussumat Fatima Begum, sued Mirza Mahomed Jaffer Khan, Shazadee Begum, and others, for possession of as. 2-6-2-2 share of the whole 1a.-6g.-2c.-1k.-4d. of the zemindaree of Buldakhal, by the reversal of a false and fabricated deed of gift.

Plaintiff alleges that her father, Mirza Mahomed Kazim Khan, the owner of 1a.-6g.-2c.-1k.-4d. share of pergunnah Buldakhal, died in 1231 B. E., leaving as heirs her (plaintiff's) mother, Shazadee Begum, the widow of the deceased, the petitioner, and her sisters Zeemiroonissa, Khadeeja, and Noorjahan, minor daughters, and a minor son, Mirza Mahomed Khan; that after his death the property was sub-divided into sixteen shares, and partitioned amongst them according to

Mahomedan law, and their names were jointly registered in the collector's books as proprietors ; that owing to the minority of the children, their mother was appointed manager of the estate, and held possession of the same, and educated them ; that after they reached majority, the mother continued to hold possession as before, and paid to each the share of the profits to which they were entitled ; that plaintiff, after entering into matrimony, continued to reside in her husband's house at Patna, being supported by the share of the profits of the estate left by her father ; that, on returning to Bengal, on a visit to her mother in 1258, she was told that a proclamation from the collector had issued on the mother of Musst. Benec Khanum, mother and guardian of Mirza Mahomed Jaffer Khan, who had petitioned the collector for mutation of names, on the allegation that plaintiff had, by deed of gift, assigned her share to the aforesaid son of the said Khanum ; that the plaintiff then questioned her mother on the point, who admitted that, in consequence of certain civil proceedings brought against petitioner, plaintiff's brother, Mirza Mahomed Khan, deceased, had, with a view to preserve plaintiff's share intact, fabricated a deed of gift in favor of his minor son, Mirza Mahomed Jaffer, dated 16th Aghun 1249 B. E., whilst plaintiff was residing in Patna, and left it in her custody, and that in the civil suit above alluded to the deed of gift was mentioned ; that plaintiff's mother then handed over to her the deed of gift ; that plaintiff never made the deed of gift to Mirza Mahomed Jaffer Khan, and had no knowledge of the fabrication of the deed, until the issue of the proclamation aforesaid ; that as defendant Mirza Mahomed Jaffer Khan has, in virtue of the said gift and the registration of his name in the collectorate by means of an Act IV. of 1840 case, since the month of Assin 1256 B. E., deprived petitioner's mother of possession, and brought her (plaintiff's) share into his own possession, the plaintiff now sues for possession of her right by the reversal of the fraudulent deed of gift, with mesne profits from the date of dispossession.

The defendant, Mirza Mahomed Jaffer Khan, in his answer, avers that the deed of gift by the plaintiff to him was good and valid and made in consideration of a pair of armlets set with diamonds, of the value of rs. 3000, and a chumpakulee or ornament for the hand, set with jewels, worth rs. 2000 ; that the deed was executed on the 16th Aghun 1249, since which date defendant has been in possession ; that, consequently, each and every allegation of the plaintiff is false.

of consideration raised by him, plaintiff is entitled to that which, but for the deed set up by the defendant, which has been declared fraudulent against two defendants who have not appealed, confessedly belonged to her.

Decision of the lower court reversed as regards the plaintiff, and the property sued for decreed to her with wasilat from Assin 1256 to the date on which she may obtain possession, and with costs.

Defendant Mirza Mahomed Jaffer Khan answers that the deed of gift is a *bond fide* document, given for good consideration. The other defendants do not appear.

The lower court dismissed plaintiff's claim, being of opinion that the deed of gift was concocted by the non-appearing defendants, but with the knowledge and consent of plaintiff, with a view of defrauding third parties.

Held, on appeal by Mahomed Jaffer Khan, that on the pleadings in this case the simple issue between the parties before the court is whether the deed of gift is an authentic document or not, and whether the consideration pleaded by defendant passed to plaintiff or not ; and that it was not competent to the principal sudeer ameen to stigmatise the plaintiff's conduct as fraudulent, when such a plea is not entered upon by defendants.

Held also, that as the defendant appealing is unable to prove the special plea

The other defendants did not appear.

The principal sudder ameen had no doubt that plaintiff's mother, Shazadee Begum, and her brother, Mirza Mahomed Khan, fraudulently prepared the deed of gift, to reverse which the present suit is brought, in order to defeat the rights of third parties, who may have claims to urge against the plaintiff. Moreover, he was of opinion that the fraud was concocted with the knowledge and consent of the plaintiff. The principal sudder ameen, then, relying on certain cases, in which the Court has ruled that parties, who sell or otherwise fraudulently alienate their property under fictitious names, with the evident intention of defrauding third parties who may have claims to urge against them, can have no assistance from the courts of justice, in case they institute proceedings to annul or set aside their own fraudulent acts, dismissed the plaintiff's claim, with costs.

JUDGMENT.

An appeal has now been preferred to this Court by the plaintiff below, against the decision of the lower court passed adversely to her. She urges that, as defendant admits that the property sued for is a part and parcel of the estate left to her by her deceased father, and pleads in contradiction to appellant that the gift to him was made by her for a consideration, and with full knowledge and consent of appellant, who received as consideration diamond armlets and other trinkets, the burden of proving these pleas rested with the defendant; that, moreover, as appellant denied having made any gift to the defendant and defendant pleaded a gift with consideration, it was incumbent on the principal sudder ameen to have decided the case on the issues raised before him, and not to have found plaintiff guilty of fraudulent conduct, with which she has not been charged by the other side; and, moreover, as defendant had not proved this special plea, she was entitled to a decree for what she sought.

We observe that the defendants have not appealed against so much of the decision of the principal sudder ameen as finds Shazadee Begum and plaintiff's brother, Mirza Mahomed Khan, deceased, guilty of fraud, and which ignores the plea of gift from plaintiff to Mirza Mahomed Jaffer Khan for good consideration; it only therefore remains for the Court to determine whether the principal sudder ameen's decision, as it affects the plaintiff, appellant, can stand or not.

On turning to the pleadings, we find that plaintiff alleges that the deed of gift in favor of Mirza Mahomed Jaffer Khan, which she is alleged to have executed, is a forgery; that she neither executed it, nor had any knowledge of its execution till the issue of the proclamation of the collector for the mutation of names; that it was

concocted by Shazadee Begum and Mirza Mahomed Khan, with a view either of fraudulently ejecting her from her right, or of doing what they considered to be to her a piece of service—in either case without authority from her.

In his answer, Mirza Mahomed Jaffer Khan, who alone appeared, pleaded that the share sued for formerly belonged to plaintiff, but that, as plaintiff's husband's house was in Azeemabad, and there was hardly any chance of her returning thence, she, on 16th Aghun 1249 B. E., executed a deed of gift of the property now sued for in his favor, he being then a minor, in consideration of a pair of armlets set with diamonds, worth rs. 3000, and an ornament for the hand set with jewels, worth rs. 2000, and having received the ornaments, she put her seal to the document.

Now, upon these pleadings, the simple issue is, was the deed of gift propounded by the defendant an authentic document, and did the consideration stated by him pass to the plaintiff or not ?

The principal sudder ameen, not content with determining that the conduct of certain defendants was fraudulent, and that the gift with consideration to the defendant was not proven, stigmatised also the conduct of the plaintiff as fraudulent, and dismissed her claim. It is possible that the plaintiff's conduct was as represented by the principal sudder ameen, but it is not pleaded to have been such by the defendants in the suit ; moreover, if any parties, creditors of the plaintiff, by the fraudulent acts of the different defendants, have been endamaged, on the property reverting to the plaintiff, they will be enabled to obtain their rights. Under this view we think that the precedents cited by the principal sudder ameen, with which we entirely agree, are not applicable to the present case, and that his decision cannot stand, but that, as the defendants were unable to prove the special plea raised by them, plaintiff was, as against them on the pleadings in the case, entitled to possession of that which, but for the deed set up by defendants, confessedly belonged to her.

Under this view we reverse the decision of the principal sudder ameen, as it regards the plaintiff, and decree to her the property sued for, with wasilat from the month of Assin 1256, the date on which the defendant Mirza Mahomed Jaffer Khan obtained possession of the property, to the date on which plaintiff, appellant, may obtain possession of the same, with costs.

THE 30TH MARCH 1859.

A. SCONCE and C. B. TREVOR, ESQS., Judges, and H. V. BAYLEY, ESQ.,
Officiating Judge.

Case No. 886 of 1857.

Special Appeal from the decision of Nusseeroodeen Mahomed, Principal Sudder Ameen of Dacca, dated 26th December 1856, reversing a decree of Baboo Rashbeharee Bose, Moonsiff of Furreedpore, dated 12th March 1856.

Rychund Bunik, (Plaintiff,) Appellant,
versus

Greeshchunder Goho and others, (Defendants,) Respondents.

Baboos Unookoolchunder Mookerjee and Ashootosh Chatterjee,
for Appellant.

Baboos Kishenkishore Ghose and Prosonnochunder Roy, for Ram-
soonder Paramanik, Respondent.

A special appeal was admitted to try whether parole evidence could be admitted to alter the express words of a deed.

Held, that parole testimony, though admitted to explain, cannot be received to vary, contradict, or subtract from the terms of a valid written instrument.

THIS case was admitted to special appeal on the 18th November 1857, under the following certificate recorded by Messrs. A. Sconce and J. S. Torrens.

"The petitioner in this case purchased the rights in a mouroosee pottah granted to one Greeshchunder Goho, on payment by him, as specified in the document, of rs. 40; the land to be held on payment of the annual rent of rs. 3. The defendants, the lessors to Greesh, admit the pottah, but withhold possession from petitioner, on the ground that the transaction with Greesh consisted only of a mortgage. The moonsiff gave petitioner a decree, as he held that he had acquired a right to possession under the purchase of the pottahdaree rights. But the principal sudder ameen reversed this judgment, as he considers certain parole evidence to prove that the transaction under the pottah was merely one of mortgage. Petitioner urges that the parole evidence cannot be admitted to set aside the express words of the lease, or to convert it from an hereditary lease to a mere mortgage.

"We admit the special appeal to try the question."

JUDGMENT.

On a reference to the judgment of the principal sudder ameen, we find he considers the pottah a *pachani* pottah, which he goes on to interpret by the words "*meeras ijara*," and he comes to the conclusion that the terms of the pottah do not show it to be one of a perpetual hereditary lease. He also holds that, as the original grantor and grantee of the lease and others had deposed, that by the pottah it was not intended by the parties to do more than convey a temporary transfer of the land, by way of mortgage, that evidence is sufficient to make the *meeras* pottah not a deed

conveying an absolute and hereditary right. The special appeal has been admitted to try whether parole evidence can be admitted to set aside the express words of a deed.

On a reference to the deed itself, we find its terms are absolute, and convey a perpetual hereditary title binding on the heirs of the grantor, and fixing the jumma at 3 per annum, and we do not find the word *pachani*, or any other term, modifying the absolute and perpetual character of the lease. As to whether parole evidence may be admitted to set aside its express terms, the rule is, that parole testimony, though admitted to explain, cannot be received to contradict, vary, add to, or subtract from the terms of a valid written instrument, because such evidence, while deserving far less credit than the writing itself, would inevitably tend, in many instances, to substitute a new and different contract for the one really agreed upon, and would thus, without any corresponding benefit, work infinite mischief and wrong; and applying this leading principle to the facts of this case, we do not think the lower court's judgment correct. We therefore reverse the decision of the principal sudder ameen, with costs on special respondent.

THE 30TH MARCH 1859.

A. SCONCE and C. B. TREVOR, ESQs., Judges, and H. V. BAYLEY, ESQ.,
Officiating Judge.

Cases Nos. 479, 480, 481, and 482 of 1858.

Special Appeals from the decision of Mr. H. S. Thompson, Principal Sudder Ameen of East Burdwan, dated 26th January 1858, modifying a decree of Moonshee Koodrutoolah, Moonsiff of Bamunarraha, dated 28th March 1857.

Hurishchunder Banerjee and others, (Defendants,) *Appellants,*
versus

Gyaram Mundul, (Plaintiff,) and Neelruttun Banerjee and others,
(Defendants,) *Respondents.*

Baboo Sreenath Dass, for Appellants.

THESE cases were admitted to special appeal on the 31st July 1858, under the following certificate recorded by Messrs. A. Sconce and D. I. Money.

"These two petitioners object to being saddled with liability for arrears of rent due on account of four jotes, with which they say they have no connection. The jotes in question bear the several rents to the two last years, as the principal sudder ameen has misapprehended the effect of a previous decision passed in a suit brought for the rents of 1262, which determined that special appellants were not in possession of the land, and not liable for the rent claimed.

Arrears of rent for 1260, 1262, and 1263 having been adjudged by the lower appellate court, that decision is modified with respect

of rs. 13-3-7½, rs. 21-15½, rs. 32-8-16, and again rs. 32-8-16, in the names of different persons.

"The arrears claimed are for the years 1260, 1262, and part of 1263; and the principal sudder ameen, holding petitioners to have been in possession of the four jotes for the years in question, gives judgment against them.

"The ground of special appeal is, that the principal sudder ameen misunderstood the effect of a decision made by the moonsiff on the 19th June 1856, by which, in a suit instituted by these petitioners, respecting the rents of 1262, against the present plaintiff, they were held to be exempted from liability for the year in question.

"The principal sudder ameen appears to think this decision was counteracted by a subsequent decision made in a second case; but this subsequent decision referred to rents due to the farmer for a farm of a second share of the village, and as it is doubtful whether a definite decision already made for the rents of 1262 should not govern a second claim made for rents of the same year, we admit this special appeal to try that point."

JUDGMENT.

In these cases plaintiff does not appear before us to support the order made below.

The suits are brought, as above explained, to recover rent for the years 1260, 1262, and part of 1263, on account of five jotes, of which four cases are now before us, the special appellants and the representatives of the jotedars being defendants.

Special appellants deny their occupancy of the jotes, and assert their non-liability, while the representatives of the jotedars admitted their sole liability; and the ground taken for the reversal of the principal sudder ameen's order is that, in a suit brought by special appellants to set aside the distraint made by the present plaintiff of their property, for rent due on account of the same jotes for the year 1262 down to the end of Phalgun, it was definitely determined that special appellants were not in possession of the jotes.

We find that the principal sudder ameen has erred in supposing that the jotes now under contest did not form the subject of contest in the moonsiff's decision of the 19th June 1856, for the jummas of the jotes in both cases are identical; and again he has erred in supposing that, in a second decision passed by the same moonsiff, subsequent to the decision of the 19th June 1856, the jotes of which special appellants were held to be in possession corresponded with the jotes referred to in the first decision. On the contrary, the jummas of the jotes in the second decision are different from those in the first, and the mehal to which they are subordinate is different from the mehal embraced in the first decision. We must conclude,

therefore, under the definite decision of the 19th June 1856, declaring special appellants not to be in possession in 1262, that plaintiff in this action is not competent to claim from special appellants rents as tenants in possession for 1262 and 1263, but the same ruling will not apply to the rents of 1260. We, therefore, so far modify the principal sudder ameen's decree as to exempt special appellants from liability for the rents of 1262 and 1263, and costs will be charged throughout in proportion.

THE 30TH MARCH 1859.

A. SCONCE and C. B. TREVOR, Esqs., Judges, and H. V. BAYLEY, Esq.,
Officiating Judge.

Case No. 532 of 1858.

*Special Appeal from the decision of Mr. E. DaCosta, Principal
Sudder Ameen of Tirhoot, dated 8th December 1856, affirming
a decree of Moulvee Amjad Alee, Moonsiff of Mohwa, dated
31st July 1855.*

Mewalal, (Plaintiff,) Appellant,
versus

Premdeocharain, son and heir of Ununtolal, deceased, and others,
(Defendants,) Respondents.

Baboo Dwarkanath Mitter, for Appellant.

Baboo Kishensukha Mookerjee, for Gujraj Singh and Brohmo-
debnarain, Respondents.

THIS case was admitted to special appeal on the 26th August 1858, under the following certificate recorded by Messrs. H. T. Raikes and J. H. Patton.

"The petitioner sued to set aside proceedings of the survey officers, on the ground that those proceedings had included 5b.-5c.-19d. of land appertaining to his village of Rampore Muneerampore within the area of the defendants' estate; but the lower courts have dismissed the claim as barred by the limitation provisions of Act XIII. of 1848.

"The special appeal is preferred on the plea that, when the survey proceedings were held, by which petitioner's lands were wrongly demarcated, petitioner did not then prefer objections, and, consequently, no award was recorded against him. The limitation, therefore, which prohibits actions to contest awards three years afterwards, does not apply to claims which were not subjected to adjudication before the survey authorities at all; that the order of the 12th June 1849, whereby the survey officers then refused the

Held, that in order to bring a proceeding within the category of an award, there must be a judicial enquiry, either more or less formal; that in the present instance the survey officer refused to enter into any enquiry at all, and the mere record of this refusal is no award, and, consequently, special appellant, is well within time in bringing his present

suit under the general law of limitation.
Case remitted to the lower court for investigation on the merits.

petitioner a hearing, cannot constitute his ground of action, and the lower courts have erred in reckoning limitation from that date.

"We admit this appeal to try, *first*, whether the order of the 12th June 1849 should be considered as the origin of petitioner's ground of action ; and if not, whether he be entitled to sue (as against the survey proceedings of 1846, which deprive him of the lands in suit) without reference to the special limitation prescribed by Act XIII. of 1848, petitioner having at that time omitted, intentionally or not, to urge his claim before the survey officers."

JUDGMENT.

The only point before us is, whether the order of the survey department, dated the 12th June 1849, is of such a nature as to fall within the definition of an award, as that term is used in Act XIII. of 1848.

It appears that in 1849 the special appellant petitioned the survey authorities, soliciting a correction of the thak, by which 5b.-5c.-19d., appertaining to his village of Rampore Muneerampore, had fallen within the area of Bishenpore Surdoo and Bishenpore Ruttee, belonging to another party.

The survey officer, rejecting this petition, remarks, that the thak had been complete more than three years previously ; that no objection has been made by petitioner at or after the measurement and survey, and after such a lengthened period petitioner should have recourse to the civil court.

Now, as has been laid down by this Court on several occasions, in order to bring a proceeding under the category of an award there must be a judicial enquiry either more or less formal. In the present instance the survey officer refused to enter into any enquiry at all ; it follows that the order merely recording this refusal is no award under the Act above cited, and plaintiff, who instituted his first action to set aside the survey proceedings in 1849, which was subsequently nonsuited on the 12th May 1852, and who, now on the 4th August 1854, has re-instituted his suit for the same purpose, is well within time under the general statute of limitations.

We remit the case to the principal sudder ameen, with directions that he will remand it to the court of first instance for investigation on its merits.

THE 30TH MARCH 1859.

A. SCONCE and C. B. TREVOR, Esqs., Judges, and H. V. BAYLEY, Esq.,
Officiating Judge.

Case No. 568 of 1858.

Special Appeal from the decision of Mr. E. S. Pearson, Additional Judge of Dacca, dated 22nd December 1857, reversing a decree of Moulvee Mahomed Nazim Khan, Principal Sudder Ameen of that district, dated 30th May 1857.

Mr. W. Foley, (Plaintiff,) Appellant,
versus

Mrs. E. Kalonas and others, (Defendants,) Respondents.

Baboo Ramapersad Roy and Mr. R. T. Allan, for Appellant.
Baboos Kishenkishore Ghose and Shumbhoonath Pundit, for
Mrs. E. Kalonas, Respondent.

THE application for the admission of this special appeal was originally rejected on the 19th July 1858, under the following order recorded by Messrs. C. B. Trevor and H. V. Bayley.

"Mrs. *Despino* Kalonas lent her husband *M. N.* Kalonas rs. 2000, which she raised by pledging her jewels. *M. N.* Kalonas died, and disputes arose between the widow, Mrs. *Despino* Kalonas, and the members of her husband's family. There was a private arbitration, resulting in an award that Mrs. *Despino* Kalonas was to receive rs. 2000 out of her husband's estate. This private award was executed as if it had been given under Regulation XVI. of 1793, and Mrs. *Despino* Kalonas thus realised rs. 2025 up to 25th Bhadro 1251 B. S., the date of the last payment. One *N.* Kalonas was an heir of *M. N.* Kalonas, that is, of the husband of Mrs. *Despino* Kalonas. Mrs. E. Kalonas was the representative of that *N.* Kalonas. She sold the right of action against the estate of *M. N.* Kalonas to one Munohur Dass, who is now represented by petitioner.

"The judge has held, that the summary execution of this private arbitration award is illegal, and that therefore the last payment of 25th Bhadro 1251 B. S. is no valid payment, and cannot consequently be considered to stop the application of the law of limitation. He relies on the precedent of the Sudder Dewanny Adawlut of the 20th March 1856, pages 253 and 254, in which it is ruled that, a decree being struck off the file, execution cannot be revived without authority of the court which issued the decree, and that intermediate proceedings (previous to the decree-holder's petition to such court) will not defend the case from the law of limitation. The pleader for special appellant urges that the execution by which the realisations have been made was illegal, in consequence of no decree having passed to give effect to the award under Regulation

In a case where effect had been given to a private award of arbitration, as if it had been one under Regulation XVI. of 1793, it was pleaded that a payment made immediately was consequently null and void, and could not give a new cause of action.

Held that the payment having been admitted, by not being denied in the answer, and so being an acknowledgment of the sum declared due by the arbitration award, must be taken to give a new cause of action.

XVI. of 1793 ; that the transaction was to be regarded as a private debt, and thus the plaintiff's cause of action arose as between the parties from the date on which a payment was made in the transaction between them ; and that, looked upon in this view, the period to be allowed for the suit should be from that date, i. e. 25th Bhadro 1251, which would bring plaintiff's suit within time. We think that the argument of the pleader has great weight. But we find the date of that suit is the 31st October 1856 A. D. (16th Kartikh 1263), and this is obviously beyond time. We reject the special appeal accordingly."

But a review of the above order having been applied for, the case was admitted to special appeal on the 9th September 1858, under the following certificate.

"Mr. Allan applied this day for review of the preceding order, urging, *first*, that, although the plaint was endorsed as registered on the 31st October 1856, or 16th Kartikh 1263, still it really had been filed on 18th Bhadro (1st September 1856), and that the principal sudder ameen's signature was on the face of the plaint as filed on that date ; *second*, that even if it were not so, the period available to file the plaint was to the 25th Bhadro 1263, and that the Courts were closed from 19th of Bhadro, or 2nd September, to the 15th Kartikh 1263 (30th October 1856). Mr. Allan has satisfied us that the Courts were, under the authority of the Sudder Dewanny Adawlut, shut for the above period. We therefore allow the review, and admit the appeal to try whether the decision of the judge, holding that the suit is barred by the statute of limitations, is correct."

JUDGMENT.

The question to be decided in this case is, whether the plaintiff is not within time to sue, inasmuch as a payment had been made in acknowledgment of the debt on 25th Bhadro 1251, and such payment gave plaintiff his cause of action. It is not disputed by the other side that, if plaintiff's cause of action does arise from the above date, he is within time ; but the special respondent contends that, as effect had been illegally given to a private award, as if it had been one under a decree of Court, duly executed according to Regulation XVI. of 1793, all payments and transactions under it were null and void.

We find by the record that plaintiff in his suit claimed in the first place a principal sum of rs. 2000, with interest rs. 3832, in all rs. 5832 ; that he then deducted rs. 500 and rs. 200 on account of payments from the opposite party made through the surburakar, the latter of which payments, it is not disputed, bears date 25th Bhadro 1251. The plaintiff then avers that rs. 1325 were *subsequently* received and paid between the parties direct (*apud*), but

gives no date, and tenders no receipt as for this payment. The result is, that plaintiff claims the principal, rs. 2000, and interest, rs. 1800, as the net sum due to him after the above deductions. The defendant pleaded that the payments were of no avail, as made illegally, the private award having been executed contrary to law : but did not deny the payments alleged to have been made to the surburakar, or that of rs. 1325, nor do they question that such payments were really made as averred by plaintiff.

If we had only the payment of the rs. 200, according to the receipt of the surburakar of 25th Bhadro 1251 B. S., we might have doubted its sufficiency alone to give plaintiff the cause of action he avers it does : for, from the act of the surburakar no consent of the special respondent can be presumed. But not only did the special respondent not repudiate the receipt alleged to have been given by the surburakar, but in the answer there is no denial or question of the plaintiff's averment, that *subsequently* to the payment of rs. 200, through the surburakar, on 25th Bhadro 1251 B. S., rs. 1325 were paid and received by the parties direct.

Under these circumstances we consider that the direct payment of rs. 1325 averred by plaintiff must be taken as admitted, and that, being a payment in acknowledgment of the original sum declared due by the arbitration award, it must be taken to give plaintiff a cause of action within time, irrespective of the question whether that award was properly executed or not.

We therefore reverse the decision of the judge, with costs, and remand the case to be tried on the remaining issues, and its merits generally.

THE 30TH MARCH 1859.

A. SCONCE and C. B. TREVOR, Esqs., Judges, and H. V. BAYLEY, Esq.,
Officiating Judge,

Case No. 608 of 1858.

Special Appeal from the decision of Pundit Sreenath Bidyabagish, Principal Sudder Ameen of Chittagong, dated 18th December 1849, reversing a decree of Baboo Nobokisto Sein, Acting Sudder Moonsiff of that district, dated 17th January 1848.

The Government, (Defendant,) Appellant,
versus

Shumsheir Alee, well-wisher of Musst. Noorjan Beebee, daughter
of Mahomed Ruffee, deceased, (Plaintiff,) Respondent.

Baboo Ramapersad Roy, for Appellant, Ex-parte.

In this case, THIS case was admitted to special appeal on the 22nd September 1858, under the following certificate recorded by Messrs. H. T. Raikes and J. H. Patton.

"This is a petition of special appeal on the part of the Government, against an order of the lower appellate court, reversing a sale for arrears of Government revenue.

"The sale was held on the 25th of February 1845, and a suit instituted to reverse it, on the ground that the estate paid a sudder jumma of less than rs. 10, and was, under the Board's orders of the 4th February 1845, exempt from sale process, except on the 25th of May in each year.

"The first court dismissed the suit, considering that the sale law, Act I. of 1845, under which the exemption was given, did not come into operation until the 1st of March 1845; but the appellate court below reversed the sale, holding the Board's letter of the 4th February 1845 to be the date from which the rule should be considered as in operation.

"In support of the ground of special appeal, we are shown* that under Act XII. of 1841 the days of sale in Chittagong were fixed for the 25th of February, the 25th of May, the 25th of September, and the 26th of December in each year.

"And when new notices were required in consequence of the promulgation of Act I. of 1845, the dates for Chittagong were fixed for the 25th of May, the 25th of September, the 26th of December, and 1845, which did not come into operation till the last day of February 1845, while the sale in question occurred on the 25th February, under the provisions of Act XII. of 1841.

* See Calcutta Gazette of 1841, page 811.

the 25th of February in each year,* and a clause was added that estates under rs. 10 sudder jumma would be sold only once a year, on the 25th of May.

"Now the sale in suit took place on the 25th February 1845, while the old Act XII. of 1843 was still in operation, and under the proclamation issued for sales under that Act, which did not restrict those of estates under rs. 10 sudder jumma to once in the year. Consequently, it is alleged, the sale on the 25th February 1845, though subsequent to the letter prescribing the dates for sales under the new Act of 1845, which came in force from the 1st of March of that year, was perfectly legal under the proclamation, which fixed the dates of sale under the old Act of 1841, and which proclamation remained in force until the close of February 1845.

"As it seems to us that the letter of the 4th February 1845 cannot be held to have had any application to the sales held under Act XII. of 1841, and that the distinction between estates under rs. 10 jumma was first introduced in the proclamation regarding sales under Act I. of 1845, we admit this special appeal, to try whether the principal sudder ameen was right in reversing the sale on the grounds taken by him for that order."

JUDGMENT.

Upon the grounds stated in the admission of this appeal, we think the principal sudder ameen's order must be set aside. The new Act I. of 1845 did not supersede the old Act XII. of 1841, till the last day of February 1845, and necessarily a sale made on the 25th February under the earlier law could not be governed by the rules promulgated for the holding of sales under the new law.

We reverse the principal sudder ameen's decree, and dismiss the suit, with costs.

* See *Calcutta Gazette* of 1845, page 172.

THE 30TH MARCH 1859.

H. T. RAIKES and J. H. PATTON, ESQs., Judges, and G. LOCH, Esq.,
Officiating Judge.

Cases Nos. 162 and 163 of 1857.

*Review of Judgment passed by Messrs. C. B. Trevor, G. Loch,
and H. V. Bayley in the above special appeals, and admitted
to review on 25th September 1858.*

Rajah Nursingh Deb, (Defendant,) *Appellant,*
versus

Ryemonee Dehea and others, (Plaintiffs,) *Respondents.*

*Baboos Kishensukha Mookerjee and Jugudanund Mookerjee, for
Appellant.*

Baboo Baneymadhub Banerjee, for Respondents.

Held, that THIS case was admitted to review by Messrs. C. B. Trevor, G. Loch, and H. V. Bayley, on the 20th September 1858, under the following certificate.

"An application has this day been made for a review of the judgment passed by us in the cases noted below, by Baboo Baneymadhub Banerjee, on the part of Doorgachurn Roy and others, on the ground that the special statute of limitations, on which the appeal was decided, had not been pleaded by the defendant below; and that, consequently, even though it might be applicable, it could not for the first time be taken up in special appeal.

"On reverting to the records, we find that the plea of the statute of limitations, Act XIII. of 1848, was not pleaded against petitioner in the lower courts; it was first mentioned in the reasons of special appeal urged by the special appellant.

"This point now urged was not brought to our notice or adverted to by us at the time of the hearing of the case; but we think it is of the first importance to adhere to the principle on which we have several times acted, to the effect that a party who, in the courts below, omits to plead the statute of limitations, which was his remedy alone, must be considered to have waived it, and to have been content that the case should rest upon its merits. We, therefore, see reason to doubt the correctness of our former ruling, and admit a review of the same on this ground."

JUDGMENT.

A review of the judgment of this Court, dated the 31st March 1858, has been admitted to try whether a plea of limitation, urged by the appellant in special appeal, which had not been pleaded in the lower court, can be heard, or whether the appellant must not be considered to have waived it, and to have been content that the case should rest upon its merits.

The decision is printed at page 570 of the Reports of 1858.* Plaintiff sued to set aside certain awards of the revenue authorities. Limitation, it is stated by the counsel for the special appellant, was pleaded generally in bar of hearing the suit, but the special law, Act XIII. of 1848, was not cited. The lower courts passed over the question of limitation, and decided in favor of plaintiff on the merits. A special appeal was preferred by defendant to this Court, which was rejected; but on a review of judgment the special appeal was admitted, on the grounds that the suit was barred by the law of limitation under Act XIII. of 1848. The plea was held to be valid, and the decision of the lower courts was reversed on the 31st March 1858. A petition for review was then filed by plaintiff, respondent, urging that, as the plea of limitation had not been taken by the defendants in the lower courts, it could not be admitted for the first time in special appeal; and the present review of judgment has been admitted to try this question.

It is now urged by the special appellant, Rajah Nursingh Deb, that a plea of limitation may be taken up at any stage of the proceedings; that the decision of this Court, of the 26th April 1849, page 126, *Rama Singh versus Dhyani Singh*, ruled it to be the duty of the Court to enforce the law, even when not urged on the pleadings; that with regard to the special law, Act XIII. of 1848, the Agra Court have laid down and acted upon the same rule, as shown in the case of *Sutub versus Lalla Hur Suhye* and others, reported at page 98 of the Decisions of February 1854; and that the Privy Council, in the case of the Rajah of Burdwan *versus* the Government of Bengal, admitted the plea of limitation at the last stage of the proceedings, and disposed of the case on that point. It is further urged that, as the petitioner, on whose application this review has been admitted, did not appear when the suit was pending in special appeal, his objection to the decision of the Court should not now be taken into consideration.

On the other hand the case of *Emambandee versus Hur Gobind Ghose*, decided by the Privy Council and reported at page 403 of volume IV. of *Moore's Reports*, is quoted to show that the plea of limitation, on which this Court had disposed of the suit, was held to be inadmissible by the Privy Council, it not having been set forth in the pleadings.

We find that the only decision of this Court, which lays down a ruling on the subject, is that quoted by the counsel for the special appellant of the 26th April 1849, in which the majority of the Court, against the opinion of the third judge, held that the Court were bound to take up and enforce the statute of limitations at any stage of the proceedings, even if not urged on the pleadings. The ruling

* Nos. 161 and 162 of 1858, *Ryemones Debea vs. Rajah Nursingh Deb*.

of the Privy Council, however, in the case of *Emambandee*, reported at page 403, volume IV. of *Moore's Reports*, is opposed to this ruling. In that case the Sudder Dewanny Adawlut reversed the decision of the lower court, holding the suit to be barred by limitation ; but the Privy Council set aside this decision on the ground that, as the plea of limitation had not been raised in the pleadings, the plaintiff consequently had not an opportunity of meeting it, and, therefore, the plea was considered inadmissible. Nor is the decision of the Privy Council, in the case of the Rajah of Burdwan *versus* Government of Bengal, reported at page 466, volume IV. *Moore's Reports*, at variance with the decision in the case of *Emambandee*, for a special reason for admitting the plea of limitation is assigned, *viz.* that the proceedings before the collector and special commissioner, under Regulation II. of 1819 and Regulation III. of 1828, were not of the nature of a regular suit, the Privy Council thereby intimating that in regular suits the plea of limitation, if not urged in the pleadings, could not be subsequently entertained. Having, therefore, these precedents before us, and looking at the statute of limitations as barring the remedy, but not extinguishing the right, we think that, when a plea of limitation is not urged in the pleadings in bar of the suit, a defendant cannot be allowed to bring it forward in appeal, but must be considered to have waived it, and to be willing to have the suit tried on its merits. When exemptions from the ordinary law of limitation are sought under special Regulations, such as Regulation II. of 1805, or under peculiar circumstances, such as minority, the plaintiff, as has been ruled by this Court, is bound to set forth in his plaint such special law or peculiar circumstance, that the defendant may have an opportunity of meeting the plea.

The next point to be considered is, whether the stringent rule laid down in Act XIII. of 1848 can be set aside by the failure of the defendant to plead the special law of limitation. In the decision of the Agra Court of 20th February 1854, page 90, quoted by the counsel for special appellant, we find that the award of the settlement officer was distinctly pleaded by the defendant in answer to the claim, though the plea founded on Act XIII. of 1848 was not distinctly put forward by them, until the case came before the appellate court, which plea was overlooked by the judge ; and it was held that, under the circumstances, the appellants were entitled to a ruling on the applicability of that enactment to their case ; and we agree with the Agra Court in thinking that a plea of limitation under this Act, arising thus directly from the pleadings of the parties, may be entertained by the appellate court.

In the case before us, we find that the plaint distinctly sets forth, that the settlement sought to be set aside was concluded with the defendant, special appellant, by the deputy collector, on the 1st September 1849, and confirmed by the collector on the 17th idem ;

that an appeal was preferred to the commissioner by the plaintiff, who confirmed the proceedings of the collector on the 14th February 1850. The present suit to reverse that order was instituted after the lapse of three years. The defendant in his answer pleaded the general law of limitation, referring to certain judicial proceedings in the civil courts, and alluded somewhat indistinctly to the orders of the revenue authorities, but he did not plead that the plaintiff's right to question these orders was barred, nor did he plead the special law, Act XIII. of 1848. We find, therefore, that the plaintiff has in his plaint fairly and openly laid before the Court the circumstances of his claim, thus giving the defendant opportunity to bring forward the special law in bar of hearing the suit. We find that the defendant has not pleaded this special law, but has declared the suit barred by the ordinary law of limitation, with reference to certain judicial proceedings which were held previous to the settlement, but which plea was over-ruled. No mention of the special law is brought forward in his appeal to the judge; and, when the order of the lower court is confirmed, he comes up to this Court in special appeal, on the plea then first taken, that the suit is barred by Act XIII. of 1848. Under these circumstances we think the plea is inadmissible, and the special appeal should be dismissed.

With regard to the objection urged by the counsel for the special appellant, that plaintiff, respondent, having failed to appear while the appeal was pending before this Court, cannot apply for a review of judgment, we do not think there is any sufficient reason for refusing to hear him on the same grounds as a defendant, against whom an *ex-parte* decision has been given, is allowed to appeal on the record.

We reverse the judgment of this Court in cases 172 and 173, passed on the 31st March 1858, and dismiss the special appeal of Rajah Nursingh Deb, with costs.

THE 30TH MARCH 1859.

H. T. RAIKES and J. H. PATTON, ESQS., Judges, and G. LOCH, Esq.,
Officiating Judge.

Case No. 326 of 1858.

Special Appeal from the decision of Mirza Mahomed Siddiq Khan, Principal Sudder Ameen of Sarun, dated 24th November 1857, affirming a decree of Moulvee Syud Oheedoodeen Khan, Sudder Ameen of that district, dated 9th August 1855.

Sheosuhaye Singh and others, (Plaintiffs,) *Appellants,*
versus

Gobind Roy and others, (Defendants,) *Respondents.*

Baboo Unnodapersad Banerjee, for Appellant.

Baboos Shumbhoonath Pundit and Kiskenkishore Ghose, and Moulvee Murhumut Hossein, for Respondents.

By the Mitakshara law, alienation without consent of heirs being unlawful but under necessity, a transfer by mortgage, made to clear off old debts and pay for a marriage, was held to have been made under sufficient urgent cause.

THIS case was admitted to special appeal on the 14th May 1858, under the following certificate recorded by Messrs. B. J. Colvin and A. Sconce.

"Petitioners instituted this suit to set aside a deed of conditional mortgage, (subsequently foreclosed,) which was executed by Ajeet Singh and Indurjeet Singh, fathers of the several plaintiffs, and by Bhugpal Singh, their uncle, on the ground that the mortgagors were incompetent to alienate the property in question, without the consent of their sons or next heirs.

"Both the lower courts find that, of the total sum, rs. 775, for which the mortgage was made, rs. 575 had been borrowed to pay off previous debts, and rs. 200 for a daughter's marriage; and, taking the necessary cause to be thus shown for the execution of the encumbrance, they have dismissed the claim.

"The ground of special appeal is, that the purposes for which the money is allowed to have been borrowed do not, under the law of the Mitakshara, support the transfer made by the mortgage.

"We admit the special appeal to try that point."

JUDGMENT.

We have been shown by the pleader of the respondent, the creditor, that this suit was brought by the sons, on the assumption that the father and uncles of the plaintiffs had raised money by mortgaging the family property, and squandered the proceeds in pleasure and debauchery, by which means the estate now claimed had passed into the hands of the creditor. In reply to this, the creditor shows that the mortgage, by foreclosure of which he now holds the estate, was given by the father and uncles of the plaintiffs, to clear off two other previous mortgages, the time of which had

been out, and subjected the mortgagors to the loss of the estate if foreclosed, and that the money thus advanced was also expended in the marriage expenses of a daughter.

These facts were established to the satisfaction of the courts below, and, in the opinion of those courts, constituted such necessities as legalised the alienation without consent of heirs under the Mitakshara law.

The point raised in special appeal is the insufficiency of the causes stated to create such necessity as the Mitakshara law recognises.

With the finding of the lower court before us, that the causes stated do amount to the necessity required, we are only required to regard those causes as they appear on the record.

Doubtless, the encumbrance already burthening the property, when the present mortgage was executed, would have eventually necessitated a sale ; and therefore they were *prima facie* a necessity within the law. The special appellants urge that, in order to create the necessity thus represented, the creditor was bound to show that those encumbrances were also created for objects which the law allows ; but we do not think that, the absence of any allegation on the part of plaintiffs, that they were not so created, can throw upon the creditor the onus of proving the nature of them without such impeachment. Considering, then, that the record does contain sufficient to justify the finding of the courts below regarding the existence of such necessity as justified the sale, we see no reason to interfere with the judgment, and dismiss this appeal.

THE 30TH MARCH 1859.

H. T. RAIKES and J. H. PATTON, Esqs., Judges, and G. LOCH, Esq.,
Officiating Judge.

Case No. 410 of 1858.

*Special Appeal from the decision of Baboo Ramlochan Ghose,
Principal Sudder Ameen of Nuddea, dated 6th January
1858, reversing a decree of Mr. L. W. Hutchinson, Moonsiff
of Paneeghat, dated 16th June 1857.*

Ramchund Roy and others, (Defendants,) *Appellants*,
versus

Mr. Dubois D'Saran, manager and proprietor of Kotoreah concern,
and others, (Plaintiffs,) *Respondents*.

*Baboos Shumbhoonath Pundit, Gobindchunder Mookerjee, and
Bungsheebuddun Mitter, for Appellants.*

Mr. R. T. Allan, for Respondents.

Appeal dismissed. Where A held half share in a putnee lease, and defendants had taken possession of a portion of the estate comprised in it, on the ground that A and his brothers had executed a durputnee of A's share in their (the defendants') favor, the lower court found the deed to be not genuine, and kept A in khas possession.

THIS case was admitted to special appeal on the 2nd July 1858, under the following certificates recorded by Messrs. B. J. Colvin and A. Sconce.

Mr. B. J. Colvin.—"Petitioners were sued, together with Surbo-soonderee, widow of Kirpanath Sandyal, and Surbomungla, widow of Ramtunnoo Roy, by special respondents, for possession of 1 anna of kismut Joyerambattee, which, with another 1 anna share, they said, had belonged to Ramtunnoo aforesaid, on whose death his widow had given the 2 annas in putnee to Tarachand Bundhopadhya and Kirpanath Sandyal, in equal shares, when, upon the death of the latter, his widow Surbo-soonderee had sold the putnee of his 1 anna share to special respondents in 1262. These now, being opposed by petitioners, sue for possession. The objection of petitioners is, that the 1 anna was the joint share of Ramtunnoo, Kirpanath, and Sooreschunder, from whom they got it in durputnee in 1247. They, therefore, opposed the claim on the ground of limitation, and because the share, belonging to three persons jointly, could not be alienated by the widow of one. Surbo-soonderee and Surbomungla, defendants, supported the plaint, while Sarodasoonderee, widow of Sooreschunder, appeared as a third party in support of the defence.

"The first court dismissed the suit, considering upwards of twelve years' possession by petitioners proved, and their objection on the ground of one sharer being incompetent to alienate the share of three, was not disposed of, as the co-sharers could sue on that score if they liked. On appeal by special respondents, the principal sudder ameen held that petitioners' alleged durputnee was not proved. He, therefore, decreed in favor of special respondents.

"Petitioners now urge in special appeal three reasons against this judgment: *first*, that limitation bars the suit; *second*, that one

sharer cannot alienate the joint share of three; *third*, that Surbo-soonderee, being a widow, was incompetent to alienate.

"The third plea was not preferred, as it formed no part of the judgment below; and the first plea is invalid, because petitioners' durputnee title, being not established, they had no adverse possession to permit of their pleading limitation in bar of the suit. The second plea is also untenable, in my opinion; for it is not for petitioners to advance it, but for those whose shares have been wrongfully alienated to special respondents; and if Sarodasoonderee be in possession of the 1 anna share in dispute, she, not having been a party to the suit, cannot be affected by the decree. I would reject the petition."

Mr. A Sconce.—"I am not satisfied with this case as it stands, in so far as judgment has been given for plaintiffs for the entire 1 anna share, while the allegation, that the widow of one of the three brothers enjoyed a third share of the putnee, and her admission of the validity of the defendants' durputnee, as created by her husband, have been disregarded. If it so be that Sarodasoonderee is in possession of one-third of the putnee, her recognition of the defendants' durputnee should protect them to the extent of her share; but without enquiring as to Sarodasoonderee's *de facto* right, we can neither presume that that right is not in existence, nor prejudice her by deciding as if it did not exist.

"I admit the special appeal, therefore, to try whether the decision before us is not defective on the above point, or whether the principal sudder ameen's judgment may not be amended to the extent of limiting plaintiffs to a two-third share of the putnee."

JUDGMENT.

The putnee, it is admitted, was originally granted to Tarrachurn Banerjee and Kirpanath Sandyal in equal shares, and comprised 2 annas of the estate leased out. Kirpanath died, and his widow, Surbo-soonderee, sold the share of her husband to the plaintiffs, who then were opposed by the defendants, alleging that Kirpanath and his two brothers were sharers in the half of the putnee given in his name, and that the three brothers had joined together in granting their half share to defendants in durputnee. Plaintiff then sued for khas possession, refusing to recognise their durputnee at all.

The first court, partly on the evidence of long possession and partly on other circumstances, considered the creation of the durputnee proved, and dismissed plaintiffs' suit. In appeal the principal sudder ameen has refused to recognise the durputnee pottah of the defendants as genuine, and therefore decreed plaintiff entitled to khas possession.

The certificate questions this judgment in so much as it decrees to plaintiffs the right of ousting the durputneedars from the whole

half-share enjoyed by Kirpanath, and intimates the propriety of allowing the judgment to stand for only one-third share of the one-half held by Kirpanath.

But it appears to us, that any such modification would be to declare that Kirpanath's share extended only to one-third, whereas the pottah by which he and Tarrachurn held records him to hold one-half share. It was therefore incumbent on the defendants, who assert a limited interest only to have been conveyed to Kirpanath under the pottah, to prove it; which they professed to do by showing that the three brothers or their representatives jointly executed the durputnee deed in their favor; and if this had been established, and also that the three brothers held jointly, then the point raised by the certificate could have been taken up in defendants' favor.

But, as the principal sudder ameen has found that the alleged pottah in their favor is spurious, they have not proved that the joint right was exercised in their favor by the three brothers as alleged, and therefore it is not necessary to enquire in this suit whether the three brothers were joint and equal proprietors of the putnee. Defendants, therefore, are found by the lower court to have no title at all on which they can oppose plaintiff, and therefore we see no grounds for reversing the judgment in special appeal.

SUMMARY CASES.

THE 23RD MARCH 1859.

H. T. RAIKES and J. H. PATTON, ESQS., Judges, and G. LOCH, ESQ.,
Officiating Judge.

Case No. 539 of 1858.

Summary Special Appeal from the decision of Mr. W. S. Seton-Karr, Officiating Judge of Jessore, dated 1st May 1858, reversing a decree of Baboo Woopendurchunder Nyaruttun, Principal Sudder Ameen of that district, dated 4th April 1858.

Soorjokoomar Sadoo Khan, *Petitioner,*
versus

Soorujmonee Dasse, mother and guardian of Taruknath Ghose,
minor, *Opposite Party.*

Baboo Poornochunder Roy, for Petitioner.

Baboo Bhoobunmohun Roy, for the Opposite Party.

THIS case was admitted to summary special appeal on the 28th September 1858, under the following certificate recorded by Messrs. C. B. Trevor and H. V. Bayley.

"The petitioner, decree-holder, applied for certain property of the heir of the surety of a judgment-debtor to be sold.

"The heir pleaded minority. The principal sudder ameen ordered the property to be sold.

"The judge on appeal reversed the order, holding that the conditions of the security-bond did not authorise the sale, inasmuch as the surety only bound himself to the extent of the profits of a certain farm, and not for the amount of cash, which the debtor in the instalment deed himself undertook to pay.

"The special appellant urges, that the conditions of the security-bond *do* bind the surety to pay both the cash referred to in the debtor's instalment-bond, and also the further balance from the profits of the farm referred to in the security-bond.

"After a perusal of the deed of instalment and the security-bond, we are of opinion that the appeal should be admitted, to try whether the judge's construction is correct.

"We further observe, that the security-bond is in terms binding on the surety only, and not on his heirs. We admit the special appeal, to try also the point of whether the sale of the property now held by the heir of the surety can be properly made."

JUDGMENT.

After hearing and considering the kistbundee and the security-bond, we are of opinion that the surety bound himself to the full extent of the former.

That document provides for an immediate payment in cash to the decree-holder, and the grant of a farm of the surety's village of

The surety, having assumed the judgment debtor's responsibilities, all the property held by him up to his decease was answerable, and could not be withheld by his heirs.

Radhanuggur, averaging a certain rate of yearly profits, as the means of liquidating the remainder. And the surety-bond details these conditions as the terms of the compromise, and binds the surety himself to fulfil them, if the debtor fails to do so.

As the debtor failed to discharge the cash payment as agreed upon, the decree was, according to the terms of the kistbundee, put in force against the property of the surety, which, as he had deceased, was in the hands of his heir.

This circumstance, however, does not bar the seizure of the property, as the surety-bond, though declaring the personal liability of the surety in the usual terms, must be held to be binding upon such property as he held, up to his decease, the conditions being that he took all the responsibility attaching to the debtor. We reverse the judge's order, with costs, upholding that of the first court.

THE 23RD MARCH 1859.

H. T. RAIKES and J. H. PATTON, Esqs., Judges, and G. LOCH, Esq.,
Officiating Judge.

No. 800 of 1858.

Summary Appeal from the decision of Mr. M. Shaw, Judge of Sylhet, dated 24th September 1858.

Lalchund Shaha, *Petitioner,*

versus

Ummut-ul-khyr Beebee and Jamanut Khan, *Opposite Party,*
Baboos Taruknath Sen and Ramanath Bose, for Petitioner,
Ex-parte.

Under former precedents, the lower court was not competent to interfere summarily in a suit for possession of land held by a mortgagee under simple usufructuary mortgage.

THIS case was referred to a full bench on the 8th January 1859, under the following order recorded by Mr. A. Sconce.

" This application relates to a summary order made by the zillah judge, apparently under Regulation I. of 1798, for the purpose of ousting petitioner from a half share of certain villages assigned to him (and Oodoy Chand Shah,) on a lease, and as security for the sum of sicca rupees 1000, lent by these two persons, upon the principal loan being repaid by the representative of the first borrower.

" It appears that the transaction referred to was entered into on the 11th Magh 1241, when Zuman Reza Khan leased his share of the villages in question for four years, and at the same time stipulated that the lessors should continue to hold the lease till the principal was repaid. The annual assets of this share are said to have been estimated at rs. 225, of which rs. 120 was set aside as interest, rs. 70 to cover farming risks and charges, and the balance, rs. 35, was to be paid as rent to the zemindar, the

lessor. But two years later, for reasons not fully explained, the estate having been attached by the collector, this officer raised the rent payable by the lessors to Company's rupees 179-1-5 ; and it is said that the lessors paid this sum annually from the year 1242 to 1264.

"Such appears to be the footing on which the petitioner held the half share of the villages referred to, till an application was made by one Jamanut Khan, as purchaser of the property from the wife of the lessor, to be put in possession on repayment of the loan ; and it is contended for the petitioner, that the judge was incompetent to disturb his possession of the land on the mere repayment of the sum lent. From the revised assessment imposed by the collector, it is urged that the arrangement contemplated by the lessor, for the repayment of the interest on the loan, was set aside, and that the interest from 1242 is still due to the petitioner.

"It will be observed that, so far as the facts are ascertainable from the papers now before me, the assignment effected in 1241 was not of the nature of the mortgage and conditional sale contemplated in Regulation I. of 1798, but rather what is commonly designated a zur-i-peshgee lease, or a simple usufructuary mortgage within the contemplation of Regulation XV. of 1793. I apprehend, therefore, that this is not a case in which the judge could legally interfere, with the authority conveyed in Regulation I. of 1798, to restore possession to the lessor ; but as the question has not, possibly, in the above sense, been considered, I think it proper to refer it for determination by a full bench."

JUDGMENT.

It appears to us that this question, as to whether a summary suit might be entertained with the object of recovering immediate possession of land in the hands of a mortgagee, under a simple usufructuary mortgage, was fully considered and decided by the Court in promulgating Construction No. 277 of the 9th July 1817. See pages 98 and 99 of printed Constructions, new edition.

The question then put to the Court by the judge of Etawah referred to simple usufructuary mortgages, and asked whether such cases could be disposed of by a summary enquiry and decision, or should be considered subject to all the rules prescribed for regular suits ; and the answer of the Court declared that the Court was not aware of any provision of the Regulations for a summary suit in the cases referred to.

The present matter does not involve a case of conditional sale, under which, if the loan was not paid off by a certain fixed date, the lender would acquire an absolute right over the property, but is a case of simple usufructuary mortgage, by which no proprietary right can pass to the mortgagee by lapse of time ; and doubtless

the intention of the law was to interfere only when time would give to the lender an absolute right to keep the land, in discharge of the loan advanced by him.

Holding the judge to have had no power to interfere summarily in the present case, we reverse his order, and refer the applicant to a regular suit.

THE 28TH MARCH 1859.

H. T. RAIKES and J. H. PATTON, Esqs., Judges, and G. LOCH, Esq.,
Officiating Judge.

Case No. 9 of 1859.

*Summary Appeal from the decision of Mr. W. Bell, Judge of
Shahabad, dated 13th November 1858.*

Baboo Doorgapersad Singh, for self, and as guardian of Dhurmnarain
Singh and Purmoo Singh, heirs of the late Lokenath Koor,
Petitioner,
versus

Jogeshur Dass, *Opposite Party.*

Mr. R. T. Allan and Moonshes Ameer Alee, for Petitioner.

*Baboo Mohendrolall Shome, Gobindchunder Mookerjee, and
Shumbhoonath Pundit, for the Opposite Party.*

Held, that under Section XX. of the C. O., dated 17th July 1846, a civil court, making a sale in execution of a decree, is authorised to interfere summarily and give possession of the property to the auction purchaser when opposed by the judgment debtor, or a claimant whose claim has been disallowed previous to sale.

THIS case was referred to a full bench on the 2nd February 1859, under the following remarks recorded by Mr. H. T. Raikes.

"The petitioner states that his landed property was attached and sold in execution of a decree given against him.

"After the sale he instituted a suit to set it aside on the ground of some irregularity in conducting the sale. That suit was dismissed, and the purchaser has, under the usual proclamation, attempted to take possession of the lands in petitioner's possession, which it is not disputed are the lands purchased by him (the purchaser).

"Petitioner, however, refused to deliver up possession, and the judge then directed the nazir to place the purchaser in possession, and has given orders to depute an ameen to calculate the amount of wasilat, which the judge considers petitioner should pay at once to the purchaser from the date of his purchase.

"The petitioner now appeals from these orders of the judge, and argues that the law recognises no process by which he can be summarily dispossessed of his lands in favor of the purchaser by an officer of the court; that the circular order of the 17th July 1846 provides the only mode by which intimation of the purchase can be given, but that the proceeding therein prescribed does not contemplate the forcible dispossession of a debtor; that the judge was

not competent to pass the order he did, either as regards inducting the purchaser into possession, or in giving him wasilat; and that for either or both these purposes, the only remedy is by regular suit.

"There is some ambiguity in the words of the circular, and it is doubtful whether any other process than a regular suit can suffice legally for the purpose of placing the purchaser in possession. I refer this case to a full bench under the Court's Resolution of the 31st of May 1850, published at page 61 of the Rules of Practice."

JUDGMENT.

It is urged on the part of the petitioner, that neither Regulation VII. of 1825, nor Act IV. of 1846, under which the present sale was made, empower the civil courts to interfere summarily to give possession. Section XX. of the rules framed by this Court for the conduct of sales in execution of decrees, prepared and sanctioned as provided for by Section II. Act IV. of 1846, and circulated on the 17th July 1846, limits the power of the civil courts to the issue of proclamations intimating the succession of the auction purchaser to the rights and interests of the party whose property has been sold. One proclamation is to be affixed in the cutcherry where the property was sold, a second is to be sent to the darogah, and a third to the zemindar within whose estate the property sold is situated, to be affixed by them in their respective cutcherries; and it goes on to say that no other process for putting the purchaser in possession shall be necessary. The words "shall be necessary," it is contended, ought to be read "shall be resorted to," and, consequently, if, on the issues of the proclamations above adverted to, the party whose property is sold will not yield possession to the auction purchaser, his only course for obtaining possession is by a regular suit.

We have fortunately, by reference to the proceedings of this Court, when the rules issued on the 17th July 1846 were framed, means of knowing what was the intention and scope of Section XX. In reply to a reference made by the President in Council, dated the 4th July 1846, this Court, on the 16th December 1846, stated "that they considered that rule 20 of the new rules refers to disputes that *may arise* in giving possession to the purchaser in the manner prescribed, and would not bar the interference of the courts to check the further opposition of a claimant, whose claim had been already summarily adjudicated and rejected before the occurrence of the sale." This declaration of the purport of Section XX. of the rules clearly shows what the intention of this Court was, *viz.* that the court making a sale in execution of a decree has the power of summary interference, and can give possession to an auction purchaser when opposed by a claimant whose claim has been

summarily adjudicated and rejected previous to sale; and if the court can interfere against such a claim, it is surely authorised to interfere summarily against the judgment debtor, whose rights and interests have been sold and transferred to the auction purchaser. In the present case we find that the petitioner's property was sold in execution of a decree on the 6th September 1852. He filed a petition objecting to the sale, which was rejected in December 1853, and again in appeal in July 1854, and proclamation giving possession was issued. The petitioner then filed a regular suit to set aside the sale, which suit was dismissed, and, having failed by the means which the law allows of obtaining a reversal of that sale, he now, contrary to law, on the plea of possession, opposes the entrance of the auction purchaser, and would have the Court refer him to the further delay and expense of a regular suit to obtain possession of that property to which his right is unquestionable. We think the judge was, under the circumstances, fully justified in summarily interfering and giving possession; but he should confine his interference to the mere act of giving possession, leaving the auction purchaser to recover any profits, realised by the judgment debtor while in possession subsequent to sale, by a regular suit. With this modification we reject the petition, with costs.

THE 28TH MARCH 1859.

C. B. TREVOR, Esq., Judge, and H. V. BAYLEY, Esq., Officiating Judge.

Petition No. 699 of 1858.

Application for Summary Special Appeal from the decision of Mr. R. Scott, Judge of Patna, dated 10th August 1858, reversing that of Moulvee Mahomed Hanif Khan, Principal Sudder Ameen of that district, dated 25th March 1858, in the case of

Luchmeenarain, Decree-holder,

versus

Lalla Pookhun Lal, Debtor.

Moulvee Murhumut Hossein, for Luchmeenarain, Petitioner, Ex-parte.

A decree-holder in 1845 took out execution against his debtor; certain monies in deposit were attached, and the decree-holder was directed to file a receipt for the amount and to take away the money, and the decree was declared in July 1845 satisfied to the above amount. No receipt, however, was filed, and the sum in deposit went to pay other debts of the debtor.

It is hereby certified that the said application is granted on the following grounds:

Held, on special appeal, that the decree-holder was at liberty to take out execution of the whole decree obtained by him against the debtor, and that the order of the judge, dated July 1845, declaring the decree satisfied to a certain amount, was conditional on the receipt of the money by the decree-holder and on his filing a receipt; and, as he did neither, no satisfaction of judgment resulted.

Case remitted to the judge, with directions that he will remand it to the principal sudder ameen, who will pass the necessary orders in execution in conformity with the above remarks.

Luchmeenarain, decree-holder, in 1845 took out execution against his debtor, Pookhun Lal; the sum of rs. 643-7-8 was attached in deposit; the decree-holder was directed to file a receipt for the amount, and to take away the money, and the decree was declared satisfied to the above amount; and as there was no other property of the debtor discoverable by which the sum due might be satisfied, the case in execution was struck off the file.

The decree-holder has now again, after eleven years, taken out execution of his decree; and the principal sudder ameen has found that the sum in deposit was never taken by the decree-holder, but went to satisfy other debts of the debtor; that, consequently, no receipt was filed; and that, as no portion of the decree was then satisfied, the decree-holder is now at liberty to execute his decree for the whole sum due under the decree, including the rs. 643 above mentioned.

The judge considers the order of July 1845 as an absolute declaration of satisfaction of judgment up to a certain amount: he therefore reversed the order of the principal sudder ameen.

The decree-holder has now appealed against the view of the order of July 1845 adopted by the judge, and we think with reason. That order is not an absolute declaration of a satisfaction of the judgment obtained by him against the debtor. It is a conditional one—conditional, that is, on the taking of the money and the filing of a receipt by the decree-holder. On this condition precedent the satisfaction of the judgment to the amount in deposit depends; and as the condition has not been realised by the decree-holder, no satisfaction of judgment has resulted.

Under this view we think the decree-holder was at liberty to take out execution of the whole decree obtained by him against the debtor. We consequently reverse the judge's order, and remit the case to him, with directions that he will remand it to the principal sudder ameen, who will pass the necessary orders in execution in conformity with the above remarks.

THE 28TH MARCH 1859.

C. B. TREVOR, Esq., Judge, and H. V. BAYLEY, Esq., Officiating Judge.

Petition No. 25 of 1859.

Application for Summary Special Appeal from the decision of Mr. G. L. Martin, Judge of Tirhoot, dated 1st December 1858, affirming that of Mr. J. Weston, Principal Sudder Ameen of that district, dated 9th November 1858, in the case of

Laljee Sahoo, Petitioner,

versus

Bolakee Lal and others, Opposite Party.

Moulvee Abbas Alee, for Petitioner.

Baboo Unookoolchunder Mookerjee, for the Opposite Party.

Sec. XXXIX. It is hereby certified that the said application is granted on the Act XIX. of 1853 applies to following grounds.

The petitioner was cited to appear as a witness, with his account books, in a case in which one Bolakee was decree-holder and Lal-kishen judgment debtor. He appeared, but stated that his books were with a third party, Hurdeonarain. Petitioner was then discharged. Hurdeonarain denied that the books were with him, but alleged them to be with petitioner. Upon this the decree-holder petitioned for another summons for petitioner to appear with his account books. The principal sudder ameen, Mr. Weston, ordered petitioner to be again summoned. The petitioner objected, and stated that Hurdeonarain had falsely denied the account books to be with himself, and that they were with petitioner. The judge held that he had no power to interfere in regard to the order of the principal sudder ameen; but he did not give any reasons for this opinion.

We think the judge is wrong if he acted under Section XXXIX. Act XIX. of 1853, which applies to parties in a suit, and petitioner was not such party.

We further think that, where a witness has, on a first summons, attended and been duly discharged, the party re-summoning him should be called upon to state and prove a good and sufficient cause for such re-summoning of the witness, before his attendance be again enforced.

We remand the case, that the judge may proceed accordingly and pass whatever order may seem necessary.

TABLE OF CASES.

Rajkissore Dutt v. Bulbhuddur Misser.

A surburakaree tenure, consisting of twelve villages, having been purchased by plaintiff when sold under a decree for arrears of rent under Regulation VIII. of 1835, plaintiff brings this suit to oust defendant from possession of one village, which had been assigned to him by the late surburakar.

Held that, as the collector (lawfully or not) sold only the rights and interests of the defaulter in the surburakaree tenure, plaintiff was not competent to disturb the assignment made by the defaulter in favor of defendant ...

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Mr. H. Cave v. Thutroo Pasban and others ...

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Joykishen Mookerjee and others v. The Collector of East Burdwan ...

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Ramchunder Roy and others v. Jadubchunder Roy and others.

Case remanded, in order that the alleged minority of one of the defendants to the summary suit, who was sued personally and not by his guardian, at the time the rent accrued, for which that suit was brought, may be enquired into. If he were then a minor, the suit brought against him personally must be dismissed. If he were then of age, the judge will pass such a decision as may seem just and proper ...

ib.

Rungnees Debea, mother and guardian of Juggutchunder and another v. Soondersoonderee Debea and others.

Histoochunder Chuckerbuttee and others v. Soondersoonderee Debea and others.

It not being shown that appellant's documents, a kubala and wusecut-namah, were genuine and authentic deeds, but reason being rather to the contrary, decree of lower court upheld, awarding to plaintiff possession of her lands as deceased's heir, with costs against appellant ...

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Boebée Sukeena, representative of Sheik Muqseentoollah v. Baboo Doolar Singh and others.

This suit, brought to enforce an instalment bond executed for rs. 18,460 in adjustment of a debt due for rs. 42,780, was disposed of by the zillah judge in two distinct forms, that is, by an order of dismissal and by an order of nonsuit.

It was considered first, that the suit should be dismissed because the same cause of action had been disposed of on its merits on 31st August 1853; but on this appeal, without entertaining the question that might arise as to the identity of the cause of action in both suits, it was held that, as the first suit was nonsuited in this Court, in reversal of the zillah decree of August 1853, this second action was necessarily admissible.

Second, it was considered by the zillah judge that the claim should be nonsuited, because, as the instalment bond provided that, on failure of payment, the full debt should be exigible, plaintiff should have sued upon the old debt and not upon the lesser sum for which the adjustment had been effected; but the Court reserving any opinion as to the compe-

tendency of plaintiff, who had definitely accepted a lesser sum, to bring an action by way of penalty for the larger debt, was of opinion that, as plaintiff had elected to stand by the compromise and not enforce the penalty, the form of his action did not warrant an order of nonsuit ... 399

Rajah Burdakant Roy v. Ramdhun Holdar and others.

Held, that the special appellant is entitled to retain the possession awarded to him under Act IV. of 1840 until a party proves a right to possession superior to his; and that, consequently, the decision of the judge, which has looked only to the fact of possession on the part of the plaintiff previously to the institution of the suit under Act IV. of 1840, cannot stand.

Case remitted, in order that the judge may enquire into the plaintiff's right to possession under a mouroossee lease, as claimed by him in his plaint ... 401

Bhowanaseen Sookool v. Aymanchand Beebee.

A, having voluntarily interposed to stay a sale about to be made in execution of the rights and interests of a judgment debtor in certain property, by paying in the money due by the debtor, has brought this suit to recover the money so paid.

Held, that the action will not lie ... 402

Musst. Meena Koowur and others v. Musst. Rajoo and others.

A village, belonging originally to one of plaintiff's ancestors, had been granted by him as roomnaiaes to a relative who, in 1839, sold it to defendants. In 1842 another ancestor sued to establish the invalidity of the grant, but his suit was dismissed. In that suit he admitted defendants to be in possession of the entire area of the village. In 1843, defendants having sued for separation of the village from plaintiff's talook and determination of their share of the assessment of the talook, the principal sudder ameen assumed on oral evidence that the area of the village contained 250 beegahs, and fixed the assessment accordingly. In 1847 the survey officers ascertained the area to be 380 beegahs. Plaintiff now sues for the difference—130 beegahs, alleging that it had been decided the village only comprised 250 beegahs, that the defendants had dispossessed him of 130 beegahs in 1252, and that, as owner of the parent talook, he was entitled to all land in excess of the 250 beegahs. The principal sudder ameen held the suit barred by limitation. Plaintiff then appealed on the ground that the principal sudder ameen, by confining him to the single issue of limitation, had prevented him from adducing proof of dispossession. Held, that that issue obviously required proof from him of possession within twelve years, and that the principal sudder ameen's erroneous estimate of the issue in 1843 was immaterial. Plaintiff's case dismissed on his failure to prove either that the grant was limited to 250 beegahs or that he had been in possession within the period of limitation ... 404

Rammohun Banerjee v. Brijonath Roy and others.

The lower appellate court held this action to be barred by a decision pronounced in an earlier suit relative to the same subject matter; but as the earlier decision nonsuited the plaintiff, the present action is necessarily admissible ... 407

Junnumjoy Mitter v. Robert Pereira, and after his demise J. Pereira and others, sons of the deceased.

Held, that all landholders are competent to enhance rents, and that this privilege is not confined to auction purchasers, and that Section IX.

Regulation V. of 1812 prescribes the steps to be taken by landholders generally before a tenant becomes liable for enhanced rent ... 408

Muthooranath Banerjee v. Cazez Khoda Newaz and others.

The principal sudder ameen having dismissed a suit for arrears of rent, on the ground that, according to Section X. Regulation VIII. of 1831, a kuboonlyut was essential, and that the fact of plaintiff's exhibits having been tampered with rendered it unnecessary to enquire into the fact of the defendant's possession of the tenure, and having refused to summon the defendant, unless plaintiff would take an oath that the defendant's signature to a certain paper was a forgery, the case was remanded to the principal sudder ameen, with instructions to enquire into the merits of the case, and examine the defendant, if necessary ... 409

Joogulkishore Chowdhree v. Mohubut Aleo.

Joogulkishore Chowdhree v. Mohubut Aleo and the Collector and others.

Two suits were brought before the Court in these appeals, in one of which special appellant was defendant, and in the other plaintiff.

In the first case the plea of limitation is raised; and it is admitted that plaintiff, a sale purchaser, brought his action for the land claimed more than twelve years after his purchase; but as the land in question is moabad, the property of Government, and as Government had assigned over its right to plaintiff, this action, brought within twelve years from the assignment, is held to be within time.

The second suit was nonsuited by the lower appellate court upon the ground of multifariousness, as being brought to correct the entries in measurement records and for settlement: but, in reversal of the order below, the case is remanded for trial on its merits ... 411

Bulbhudder Misser v. Rajkishore Dutt.

These suits were brought by special appellant for arrears of rent, and two points are raised in special appeal.

First, that as the first court, upon the arrear awarded, made no deduction by way of percentage as surburakaree allowance, and defendant did not appeal, it was not competent to the lower appellate court, upon the appeal of plaintiff, to award that deduction.

And second, that the lower courts, which rejected plaintiff's claim for two years' rent, erred in not requiring defendant to prove the payment which he pleaded.

Held that, upon the second point, the lower courts have miscarried, and as plaintiff's claim must go back for re-consideration and adjustment as to the exact amount due by defendant, no definite opinion of this Court upon the first point is now called for ... 415

Beebee Sree Luchmeejee v. D. S. Cohen and others.

Copies of letters and registered receipts of letters sent from the one party to the other, were put in as evidence of a notice to defendant to attend and make delivery of indigo according to an agreement.

Held, that although the plaintiff should more fully have proved the letters by the testimony of the writer and others cognizant of them, still, with reference to the transmission of letters on the dates in the receipts, to the defendant's not showing what other letters came under those receipts, and to the testimony of plaintiff's witnesses generally, the proof of plaintiff's having performed his part of the contract and having called upon defendant to deliver the indigo, was sufficient.

Held also, that the evidence of plaintiff's witnesses in connection with the statements of defendant, as to the quantity of indigo manufactured in

- 1853, was such as to require no interference on the part of this Court with the judge's decision as to this point ... 418
- Beebee Sree Luchmeejee v. Mr. D. S. Cohen and others ... 421
- Sreenath Roy v. Ruttunmalla Chowdhraim and others.

The subject matter of this suit is the validity of a talookdaree pottah granted by the mother of plaintiff, a Hindoo widow, before she had adopted plaintiff. Both the lower courts affirmed the pottah and dismissed the suit; and a special appeal having been admitted on two grounds, it is held, with reference to the first, that the zillah judge had not relieved defendant, the lessee, from submitting proof of the circumstances of necessity that have been held to justify the grant of the talook by the plaintiff's mother; and with respect to the second, that the danger of losing the whole estate by a sale for arrears of revenue, and the limited and encumbered resources of the widow, which together were held to justify the widow in seeking relief by the creation of the defendants' talook, furnish grounds of legal necessity within the contemplation of the law. ... ib.

Akbar Alee and others v. Bhowanychurn Ghose and others.

Case remanded, that the judge might find clearly whether special appellants were judgment debtors, whose rights and interests, as such, could be sold ... 435

Musst. Lodhoomona Dassee v. Gunneschunder Dutt and Kistochunder Dutt.

It not being proved that the mother and heir of deceased lent her support to a will proved to be spurious, nor that she had forfeited her rights through waste, the lower court was not justified in excluding her from possession of his estate, and awarding maintenance only ... 436

Mrs. Barbara Sarah Jane Rainey v. Bhugwanchunder Ghose and others.

Mrs. Barbara Sarah Jane Rainey v. Woomachurn Ghose and others.

Review of judgment disallowed in absence of cause shown to disturb original decree ... 439

Musst. Khemamoyee Chowdhraim and others v. Mahomed Chowdhree and Anundgopaul and others.

Held that, where there is no mention in the plaint of a demand for a receipt, penal damages under Section LXIII. Regulation VIII. of 1793 and the Sudder Court's judgment of 20th April 1858, page 764, Decisions, cannot be decreed. But the order decreeing plaintiff a receipt was affirmed ... 441

Lokenath Surma Roy Misser Bidyalunkur (third party in the first instance.) v. Shusteedhur Surma, and Huronath Surma and others, and Muddunmohun Bytal and others (third party in the second instance).

Plea of limitation held not to apply, as the majority of plaintiff must be reckoned from the end of his eighteenth year, he being as zemindar in possession of one portion of an estate for recovery of another portion ... 442

Chundeeka Dassee v. Goureepersad Dutt and others.

Case remanded, the limitation term properly being reckoned from the date of confirmation of sale, and therefore of possession, not from the date when the rents of right belonged to plaintiff ... 443

Kaleecoomar Chatterjee v. Hurrochunder Roy and Lalchand Banerjee and others.

Case remanded; the lower court having decided the case ex-parte, when the respondent, though he had taken the option allowed by law of filing no

- answer, was yet desirous at the trial to contest appellant's arguments verbally ... 445
- Muddunmohun Roy v. Raheem Buksh and others.
- Appeal rejected ; kistbunde, now repudiated, having been admitted by appellant in the lower court* ... 447
- Methun Lal and others v. Renoo Lal and Kalleechurn.
- In a suit where one party asserted that a separation had taken place in family only, and the landed property continued to be held ijmalee, but the other party averred the contrary, it was found that the lower court had not thrown the burden of proof upon the defendants, or gone on their proofs only, but had rightly weighed the proofs of both sides, and decided on the merits. Appeal dismissed* ... 448
- Ramessur Narain Sahee and others v. Gungapersad Roy and others.
- As in the case of sales set aside as invalid, so of sales reversed, the purchaser, under Regulation VII. of 1825, is entitled to receive back his purchase money on restoring the purchased property* ... 450
- Hurro Sahoye Mul v. Eusoo Beg.
- The order of the lower court affirmed, as it was proved that the payments made by plaintiff to defendant were not unconditional, but subject to a future adjustment of accounts, which the defendant has failed to make...* 451
- Musst. Juggodumba Debea, mother and guardian of Bholanath Chatterjee, v. Radhamohun Dass and others.
- The purchaser of a putnee at a sale in execution of decree sued a durputneedar for rent. The latter pleaded payment to another party as purchaser from the same putneedar. The special appellant pleaded that a suit by that other party to reverse the sale in execution, and based on such alleged purchase, had been dismissed, and the judge has not considered the fact in his judgment in this case.*
- Held by the majority, that the call should be remanded for re-trial of special appellant's claim for rent as against the durputneedar, as the right of property was with special appellant by the decree against the other party, in their suit for the reversal of the sale in execution, at which sale special appellant had purchased* ... 455
- Bamasoonderee Debea v. Paddomonee, wife of Anundchunder Mookerjee, deceased.
- Decision of the lower court upheld, as the words of the will, which declared appellant entitled to receive the maintenance while in the family, did not provide for a money equivalent to be paid to her after she had left the family* ... 457
- Joykishen Mookerjee and another v. Prannath Chowdhree and others.
- Held that, when a petition for a review of any judgment of the Sudder Court, or any inferior court, is presented after three months previously to the admission of the review, the delay must be accounted for, and those causes should be of grave importance ; otherwise, litigation might be indefinitely suspended, and all the evils incident to uncertainty in the right of property incurred.*
- Held also, that, when this Court, on consideration of all the circumstances brought forward to account for the delay, and other reasons, has empowered*

a lower court to review its judgment, it is not competent to the Court, on the judgment so reviewed coming up before it in appeal, to allow any objection as to the admission of the review to be again argued before it. ... 459
Appeal dismissed, with costs

Rajah Prosunnonath Roy Bahadoor v. Ishanchunder Banerjee and others.
 Ishanchunder Banerjee and others v. Rajah Prosunnonath Roy Bahadoor.

Suit for possession of alluvial land, on allegation of dispossession, dismissed, plaintiff having failed to make out even a prima facie case.
Prayer for a local enquiry refused. Local enquiries are only admissible for the investigation of points of detail. The material facts of the case must be established in court ... 461

Hadee Khan v. Muthoornath Acharj.

Plaintiff sued for possession of three pieces of land, amounting to 8 beegahs 14 cottahs, as part of an estate which he had purchased at a public sale. Defendant Hadee Khan pleads that he holds 2 beegahs under plaintiff, but no more.
The moonsiff gave plaintiff a decree for the amount admitted by the defendant to be in his possession.
On appeal the judge decreed the whole claim of plaintiff in his favor against defendant.
Held, on special appeal, that, previously to passing a final order in the case, the judge should depute the court ameen into the mofussil with the measurement papers prepared at the time of resumption and settlement, and give a decree against special appellant for the quantity of land which may actually appear by such enquiry to be in his possession. Case remitted to the judge to act as above directed ... 463

Musst. Choolhun v. Musst. Wajida and others.

The Mahomedan law of shuffa requires that a claim of pre-emption shall be preferred without delay. The judge, looking to this, threw out a suit for pre-emption, which had been instituted eight years after the cause of action arose.
Held that the limit allowed for institution of a suit by the Regulations cannot be restricted by the operation of the Mahomedan law, and the judge's order accordingly reversed ... 464

Baboo Ramruttun Roy v. Trepoorasoonderree Dasseea.

Plaintiff sued defendant to enhance rent. Defendant pleaded a mokurruree tenure under two pottahs of 1195 and 1198. The moonsiff, deeming the mokurruree not proved, and defendant in possession of the land as sued for by plaintiff, decreed plaintiff's claim. The principal sudder ameen, considering the pottahs not proved, still found, from a decree of 1851, defendant had always paid the same rent to plaintiff and the plaintiff's farmer, and dismissed plaintiff's claim to enhance.
Held by the majority; that the above finding did not warrant a decree holding plaintiff to be incompetent to enhance ... 465

Poorusuttum Geer Gossain v. Brij Lal and Dwarka Geer Gossain.

Case remanded for enquiry into the issues directed; it was material, in order to know whether deceased's chelas were responsible or not for his debt, to find whether his deed of gift to them of his property was valid, whether they were in possession when the debt was contracted, or after his decease took possession as his heirs, and, therefore, liable for the burdens upon the property ... 467

Woomachurn Chuckerbuttee and others v. Must. Taramonee Debea.

Case remanded for re-adjustment of costs ... 468

Must. Sunduloonissa Beebee v. Goorooopersad Raa.

Order of lower court upheld. It was proved that the portions of new churs claimed by plaintiff were within the limits of the share held by him in the parent estate; that, after accretion and before resumption proceedings, the ground was in his occupancy; and the statute of limitations cannot apply to extinguish his right because of dispossession while those proceedings pended; it could run against him from the date only of their close. The special commissioner's views could bind the civil court on the question only of liability to assessment, not on other rights ... 470

Ramtunnoo Pal v. Mr. R. Savi, Jr., and others, and Mussumat Mooktakasee, wife of Chundur Mozoomdar.

The plea that the rights and interests of one judgment debtor only were sold was not proved. Where clear proof is not given that distinct shares of a jumma are so recorded in the seriakta of the superior landlord, the tenure must be treated as a joint one, and thus liable, under Section XV. Regulation VII. of 1799, to sale for the default of one; the tenure itself being that to which the superior landlord has to look for the realisation of his rent ... 473

Baboo Protap Singh Dookur v. Rajah Soorujnarain Singh.

Defendant resisted claim of debt on certain bonds made by his agent with the plaintiff, on the ground that his agent exceeded the authority vested in him by the terms of his karbarnamah; but the loans had been recognised by defendant, and the monies paid to his use and benefit, and he could not recede now from his liability. As, however, a set-off was pleaded, case was remanded, in order that the accounts might be sifted ... 475

Indurchunder Jhajur v. Malkannissa Begum alias Larlee Begum.

Held, that in an action of detinue, in which the plaintiff sues to recover certain specific articles or their value, it is incumbent on plaintiff, if the defendant pleads the general issue, and if the specific articles be proved to have been in defendant's possession, to prove the value of each article before an alternative judgment can be given in his favor.

Held also, that cases of this nature are not within the same category with those in which, on a special plea being alone pleaded and not proved, that failure entitles the plaintiff to a decree for his claim as laid in the plaint without further evidence.

Case remitted for further investigation ... 478

Nawab Nazim of Moorshedabad v. Ranees Indurmonee, widow of Rajah Gungadhur Roy, and mother and guardian of Mohundurnarain Roy, and Kaleecoomar Ghose, the executor.

The suit was brought for possession of a mehal on an alleged deed of compromise, by which defendant was stated to have transferred such mehal, and on an alleged admission in a plaint, where present defendant was plaintiff, in which plaint, it was alleged, the receipt of the consideration for such transfer was admitted.

Held that, in considering alleged admissions, it is of the first importance to adhere to the rule of evidence, which prescribes that the whole statement containing the admission be taken together, as by this means alone can the true nature of such admission be ascertained.

Held also, that, under this rule, there is no admission in this case of the receipt of rs. 72,000 for the defendant's own purposes, or of its appropriation for

objects other than the payment of plaintiff's (the Nawab Nazim's) debts. Nothing was shown to prove that any consideration passed from plaintiff to defendant to justify the conclusion, that the defendant had still to account for rs. 72,000, and had given up the mehal sued for to plaintiff for that reason ... 480

Woomeshchunder Roy and others v. Eshanchunder Roy and others.

A durputneedar obtained possession of a putnee for a short time under Clause 4, Section XIII. Regulation VIII. of 1819, in consequence of the putneedars having withheld his rent. The plea of the ijaradar, in whose farm the putnee was included, that he was not liable for the rent of the putnee during this period, overruled, as he could not be permitted to take advantage of his own laches to evade his contract with his lessor.

The principal sudder ameen's refusal to allow time to the defendant, who filed a document and list of witnesses on the day of trial, after the case had been twice postponed, approved ... 483

Doyaleeram v. Cheydeelal and others.

A son having sued and having died during the pendency of the suit, his father, as his son's heir, represented him in the suit. The lower court deemed that, the original plaintiff having been a minor, the suit must be dismissed.

Held, that the defect which precludes minors from suing is that arising from their not having legal liabilities; and that, when plaintiff's father sued as his son's heir, this defect was cured ... 485

Soobun Singh v. Baboo Goordyal Singh.

The plaintiff obtained specific decrees against his co-sharers individually. Only one appealed, on the ground that he had already paid his quota in full. The judge refused to hear the appeal, because the other sharers had not been made respondents.

Held, that this was wrong, as the only question the judge could decide was, whether the appellant was liable for the amount awarded against him or not ... 486

Bechoo Chowdhree vs. Musumat Luchmee Chowdhraim and Purbutte Chowdhraim.

Order of lower court upheld, which confirmed widow and daughter of deceased in possession of his property, lawfully inherited by them, against a claim which was in no way substantiated of a cousin of deceased, who averred joint possession with him during his life-time, and the inability by law and family custom of the wife and daughter to inherit joint property ... 487

Sagurmonee Chowdhraim and others vs. Jugobundoo Bose and others.

The Court decided under the circumstances set forth, that the case was of a value, such that the appeal from the order of the principal sudder ameen must be referred first to the zillah judge.

Order on costs accordingly ... 488

Musumat Fatimoonissa Begum and Itrutoonissa Begum v. Gyane Ram and others.

Sheik Lall Mahomed vs. Gyane Ram and others.

Golab Lall vs. Gyane Ram and others.

Bissessur Lall vs. Gyane Ram and others.

Hunooman Oopadhya vs. Gyane Ram and others.

Held, that as a general rule, a party suing for fore-closure and possession, is bound to give an account of his receipts, and to prove them, before a

declaration of his right to possession as under a sale become absolute. But as the objection was not taken below, nor the averment there made of the plaintiff's having repaid himself from the profits, the objection was overruled.

Held also, in concurrence with the lower court, that plaintiffs' deeds, under which they sued for possession, were proved.

Held further, that where the lower court held, that the titles of other parties could not be questioned in plaintiffs' suit, and exempted them from liability, they should be exempted from costs ... 490

Anundmohun Pal Chowdhree and others v. Sheochunder Pal and others, and Mudunmohun Roy and others.

Held, in accordance with the principle laid down by the Court in the case of Maharajah Koorur Kerut Singh versus Mussumat Ranee Sresmaties, that anything which has been determined by order in execution in a former suit, and which was necessarily to be determined as being involved in the subject matter of the suit, and as being essential to any operative decree being passed upon it, must be held to be finally disposed of by the order, and, consequently, within the terms of Construction 1129.

Held also that, when in execution of a decree for a share of a property, the defendants in that suit or any third parties claim certain lands taken in execution as belonging to property other than that decreed, on such claim being rejected summarily, it is competent to the claimants to institute a fresh suit for the lands, on the supposition, wrongly included in the suit to which, in the character in which they now claim, they were not parties.

Held, therefore, that the principle of Construction 1129 does not apply to the case before the Court. The special appeal dismissed, with costs ... 493

Musst. Huromonee Debesa and Hurachunder Surma v. Kishen Mungul and another.

Held that, in adjusting an account on a bond, the course adopted by the moonisff, in crediting the amount of profits from the mortgaged property first to the liquidation of the interest, was correct ... 497

Joychunder Ghose v. Mudhoosoodun Bose and Mohessuree Dasee, mother and guardian of Kaleenath Dase and others.

Held that, on a plea in bar being overruled, and the case being remanded to be decided on its merits, it is not competent, on the merits having been entered into, and the case coming up in appeal, for the party originally pleading the plea in bar, who did not appeal against the order rejecting it, to re-open that point. Not having appealed against the order at the time, and having allowed the case to be decided on its merits, he must be considered to have waived that plea.

Special appeal rejected, with costs ... 498

Gholam Hossein Biswas v. Ramguttty Biswas and others.

Held, that, as the defendant had failed to prove the special plea, that the property in dispute had been purchased from his own means, and as the deed of partition among the members of the family was fraudulent, the property must be considered as part of the ancestral estate, and liable to follow the incidents of such property; and as the deed of conditional sale was satisfactorily proved, the Court, in reversal of the decision of the principal sudder ameen, decreed possession to the appellant ... 500

Collector of Rajshahye and others v. Messrs. R. Watson and Co.
Messrs. R. Watson and Co. v. Dost Mahomed Khan and others.

In a suit for reversal of a pannes sale, plaintiffs obtained a commission for the examination of witnesses in the Calcutta Small Cause Court, the time

within which it was returnable being fixed with their own concurrence. They neither appeared in that court, however, nor made any attempt to procure the presence of their witnesses. The commission was, consequently, returned unexecuted. Held, that the judge was right, under the circumstances, to decline to re-issue the commission.

The collector in this case was sued personally, but the Government appeared for him, and the judge in consequence refused the Government their costs. Held, that they were entitled to their costs, having a right to appear for their officer if they thought fit ... 505

Hurdial Ojha and another v. Baboo Bishendronarain Singh and others.

Where, according to the averments of the plaintiffs, they purchased a property in mortgage from defendants, by a deed of bye-bil-wufa, and before payment of the whole price to defendants, they, plaintiffs, leased a part of the property, the extent of which was disputed under a zur-i-peshgee to A B, and defendants then, after service of notice of foreclosure, did not redeem their mortgage, and it was stated that at some time before or after the said mortgage, C D had bought the property at an execution sale, there was not before the lower court proof that the mortgage and lease were fraudulent and collusive, nor therefore grounds for dismissing the suit without further enquiry. Remanded for re-trial ... 509

Prannath Chowdhree and others v. Kaleechurn Dutt.

Held, that actual personal service under Section XXIV. Act XIX. of 1853 is not absolutely necessary, but that constructive personal service is sufficient to meet the requirements of the law above cited.

Held also that, as Prannath Chowdhree, the appellant, had been legally served with a summons under Section XXIV. Act XIX. of 1853, and had not appeared, and as the present appeal case is one calling for a strict exercise of the power vested in the Court by that law, the appeal of Prannath Chowdhree must be dismissed; and as to the 8 annas of the property now in his possession, the order of the lower court, declaring it liable to sale for the sum decreed to the plaintiff as due from Anandchunder Chuckerbuttee, must be affirmed. As plaintiff, respondent, does not require that the previous order in appeal, with reference to the other 8 annas in the possession of the other defendant, should be disturbed, that order as to it is confirmed.

The costs of both courts, as between plaintiff and Prannath Chowdhree, will be borne by Prannath Chowdhree.

The costs of both courts, as between plaintiff and the other defendants, will, by agreement, be borne by each party respectively. The expense incurred by Government will also be borne by Prannath Chowdhree ... 511

The Collector of Tipperah v. Gourchunder Pandit.

A farming lease for a definite period constitutes a personal contract between the lessor and the lessee, by the terms of which they must be bound. Consequently, where the tenant was not empowered by the terms of the lease to sell or transfer, held, that the lessor was not bound to recognise a sale which the tenant had effected. There is no analogy between this case and that of hereditary tenures, which are saleable by law ... 514

Manikmullah Chowdhraim, mother and guardian of Pearcemohun Roy Chowdhree, minor, and others, v. Parbuttee Chowdhraim, mother of Mathoornath Roy Chowdhree, minor.

Plaintiff obtained a decree against a Hindoo widow, his co-sharer, for her share of the Government revenue, which he had been compelled to pay, in order to save the joint estate from sale. On proceeding to execute the

decree by sale of the widow's share, he found that she had exercised a right of adoption she possessed, and had passed the property to her adopted son. The judge refused to allow him to execute the decree against the minor's share, and he, therefore, brought a suit to have the minor declared liable for his mother's debt.

Held, first, that the suit will lie; second, that, if the property had continued in the widow's hands, it would have been liable to sale for a debt of this description; third, that an adopted son is liable for debts contracted by the widow as proprietor of the estate, when such debts are contracted under necessity and for the benefit of the estate ... 515

The Collector of Tipperah v. Golukchunder Shaha and others.

Held, that as Regulation VIII. of 1819 specially allows others than the defaulting putneedar to lodge the arrears before the day of sale, the term "unless the amount of the demand be lodged" made use of in Clause 1, Section XIV. Regulation VIII. of 1819, cannot be intended to refer to the putneedar, but to the other persons alluded to, as entitled to lodge the amount and stop the sale ... 521

Mahadeo Dutt alias Karoo Singh and others v. Purmeshurepersad Narain Singh and another.

Mahadeo Dutt alias Karoo Singh and others v. Purmeshurepersad Narain Singh and another.

Case remanded, as the point at issue was not stated by the judge, nor the reasons for reversing the order of the lower court recorded in full ... 529

Ruttunlall v. Must. Jogoo Koonwur and others.

A mortgaged property to B and C as security for a loan. C, in whose name the mortgage bond was drawn up, made over all his property in gift to his wife J, who claimed the whole of the debt due by A. B instituted a suit to establish his right to half the debt. This suit was amicably settled, B's right being admitted. J then sued the heirs of A for the debt, and this suit was also amicably adjusted, they giving a fresh bond, and she giving a receipt in full for the previous debt.

B now sues to set aside these arrangements as collusive, and to recover the portion of the debt due to him. J admitted his right, but pleaded that the whole debt had been liquidated by the heirs of A, who had paid half to her and half to B, and had received their joint receipt. The heirs of A pleaded to the same effect, and filed the receipt, which has been declared spurious by the lower courts. Held, that, as the heirs of A had evidently colluded with J to defraud B, they, as well as J, must be held liable for the debt, and the mortgaged property would also be liable for sale ... 531

Synd Korban Alee and others v. Atahoonissa Beebee.

Held, that the judge has altogether misunderstood the import of the entire decree of the moonsiff of Kandee, dated 25th May 1836, upon which he has founded his decree. Case remitted, in order that the judge, having correctly interpreted that decree in the mode pointed out by the Court, and having reconsidered the case, may pass whatsoever order may seem to him just and proper ... 533

Ramkanth and others v. Ramlochan Acharj, son of Shumbhooram Acharj, deceased, and Punchanun Acharj and others.

In a suit for declaration of a right to be readmitted to membership of a dul, and cost of food provided for an entertainment, which the other members of the dul had refused to attend, held, that the latter claim was absurd

and could not be entertained, but right to membership considered capable of enforcement, and decreed in accordance with precedents cited ... 535

The Collector of West Burdwan v. Mr. J. E. Skin.

Held that, in suits brought by a putneedar, standing in the place of a zemindar, to recover possession of certain land confessedly belonging to the zemindares of which he holds the putnee lease, on the allegation that they have been usurped by the ghatwal, and are in excess of the quantity to which he is entitled, and in which the ghatwal does not deny that the lands are within the plaintiff's putnee lease, Government can have no claim directly to the lands, as they were included in the zemindares at the time of the decennial settlement; but in consequence of the indirect interest which Government has in the land, an interest arising from the nature of the services which the tenants perform, and the power which, through custom, Government has long exercised as to their dismissal and appointment, Government is entitled to be made a party to them.

Held also, that this interest is not, in a legal sense, an interest adverse to the zemindar, but it is such a material though indirect interest as, in accordance with the general rule, which lays down that all persons materially interested in the subject matter in dispute, ought to be made parties to a suit, in order that complete justice may be done and the question quoted, requires that Government should be made a party in cases like that before the Court.

Case remanded for re-investigation by the principal sudder ameen, with directions that that officer allow plaintiff a reasonable time to file supplemental plaints, making Government a party, and then accept the answer filed by Government, and pass eventually whatever decision may seem just and proper ... 537

Khajah Abool Hossein Khan *alias* Hossein Jan and another vs. Maharajah Heetnarain Singh and others.

The same parties.

The same parties.

Khajah Abool Hossein Khan *alias* Hossein Jan and another vs. Maharajah Heetnarain Singh.

The same parties.

The heirs of a Mahomedan who succeeded to his property, but fraudulently pleaded renunciation of inheritance, in order to baffle their father's creditors, held personally liable, though with liberty to prove, if they can, in execution of decree, that any property which the creditors may attach was not inherited from their father or acquired with funds derived from him. It is the duty of a Mahomedan heir to marshal the effects and pay the debts of the person whose property he inherits, before he applies it to any other purposes; and, if he fails to do this, he places himself in the position of a wrong-doer and incurs a personal liability ... 539

Gholam Hossein Chowdhree vs. Sufdurmeah and others.

Sufdurmeah and others vs. Gholam Hossein Chowdhree and others.

Plaintiffs sued to recover the value of an elephant hired from them by the defendant, Gholam Hossein, which elephant plaintiffs declared had been wantonly destroyed by the said defendant. As plaintiffs were unable to prove the charge of wanton destruction, the claim against this defendant was dismissed. Also, a claim for hire, at a certain rate per diem, was dismissed, as the claim was calculated contrary to the terms of his alleged contract with the plaintiffs ... 547

The Collector of Moorshedabad vs. Ranees Kistomonee Debea and others

Kasheasoodaree Debea vs. Ranees Kistomonee Debea and others

Ranee Kistomonee Debea vs. The Collector of Moorshedabad and others.

Held, that the validity of the permission to adopt, alleged to have been executed by Rajah Govindchunder in favor of his wife Shioeswree Debea, was by the pleadings in this case put in issue, but that, on the authenticity and genuineness of that deed, as well as on the validity of the subsequent adoption of Govindnath Roy, no clear and distinct adjudication has been pronounced.

Held, that no words occur in the principal sudder ameen's decision, sufficiently strong and explicit to allow of the Court's coming to the conclusion, that a waiver of the question of the validity of Govindnath's adoption had been made by the vakeels of the defendants in this case, and that, although it was competent to vakeels in court to waive any point pleaded by them, if they considered it for the benefit of their client so to do, still such a waiver, especially when it is the abandonment of a written plea, must be clear and distinct, beyond a possibility of doubt.

Held, that a valid regular judgment in this country upon the status of an alleged adopted son is a judgment in rem, and as such conclusive and final against all the world; and that a summary adjudication of the same nature, though not conclusive, is prima facie proof of the fact adjudicated sufficient to throw the burden of disproving the same on the opposite party.

Held, also, that the proceeding of the judge of Rajshahye, dated 20th June 1837, or 9th Assar 1244, did not refer to the adoption of Govindnath Roy ten years after its date, but only to the permission to adopt, alleged to have been executed by Rajah Govindchunder, and, consequently, it was in no sense a judgment upon the status of Govindnath Roy.

Cases in appeal remanded to the judge of Rajshahye, for re-investigation by him ... 549

Ranee Kistomonee Debea, guardian of Koonwur Gobindnath Roy, minor, v. Rajah Anundnath Roy.

Case remitted, in order that it may be taken up and considered with the case this day remanded, and such an order passed by the judge as he may consider just and proper ... 554

Kaleepersad Sein Chowdhree v. Nilmadhub Biswas and others.

Case remanded to the lower court, to ascertain by local investigation the boundary line between the disputed tenures ... 555

Poorseedun Pandeh v. Musst. Shamsunderree, wife of Luchmun Singh.

Case remitted, in order that the mofussil enquiry, which was first considered necessary by the principal sudder ameen, and which, as to its scope, has been somewhat extended by the order of the Court, may be made, and such order passed as may seem to the principal sudder ameen just and proper 559

Tareenseekant Lahoorree v. Bhageeruttee Debea and others.

Under the circumstances of the case, interest was disallowed to the decree-holder upon a sum held in deposit on his account, but not paid, pending result of an appeal of the party cast, for the period of pendency of the appeal. The decree-holder did not offer to draw the sum on security for eventual fulfilment of orders on the appeal. As the money was available, there was no risk lest it should not be paid, and no interest could, therefore, be allowed to compensate for such a risk ... 560

Mrs. Sophia Foley v. Annie Kalonas.

Held that, as the bond debt in this case was clearly held, by a final decree of a competent court, to be a personal debt of a certain party, it could not be realised from the estate of the deceased husband of such party ... 562

Prannath Chowdhree vs. Rajkishoree Dassee and others.

A sued to reverse a revenue award and to recover possession of certain lands decreed thereby to the defendants. While the case was pending, the rights and interests of A in pergunnah Bazeedpore, to which the land in dispute was alleged to belong, were sold at a sheriff's sale and purchased by the petitioner, who applied to have his name substituted in the place of A. The principal sudder ameen rejected this application and struck off the suit in default.

Held, that there was no objection to petitioner's name being entered jointly with those of the former plaintiffs, as in the decision provision could be made for the due payment of costs and profits

... 564

THE 2ND APRIL 1859.

H. T. RAIKES and A. SCONCE, ESQs., Judges, and G. LOCH, ESQ.,
Officiating Judge.

Case No. 120 of 1857.

*Special Appeal from the decision of Mr. J. Ward, Officiating
Judge of Cuttack, dated 16th April 1856, affirming a decree of
Roy Gopeenath Dass, Sudder Ameen of that district, dated
17th December 1855.*Rajkishore Dutt, (Plaintiff,) *Appellant,*
*versus*Bulbhuddur Misser, (Defendant,) *Respondent.**Mr. W. J. B. Money and Baboo Sreenath Dass, for Appellant.**Mr. R. T. Allan, for Respondent.*

THIS appeal was admitted to review by Messrs. J. H. Patton and A. Sconce, on the 10th August 1858, under the following certificate.

"This is an application for a review of the judgment made by us on the 26th November last, on the appeal of Rajkishore Dutt. We then held that the special appellant, the purchaser of a surburakaree tenure, consisting of twelve villages, which had been sold to realise arrears declared to be due by a summary decree of the collector, was entitled to annul a sub-surburakaree for one of these villages, which the defaulter had created subsequent to the assignment made to himself.

"The ground, very ably enforced by the learned counsel for the petitioner, for granting the review applied for, is that the law, which entitles purchasers of estates sold for arrears of revenue to set aside sub-tenures, does not extend to sales of sub-tenures made for recovering the arrears of those tenures, due under decrees pronounced under Regulation VIII. of 1831. There being no positive law, it was contended that the general policy of the law cannot be held to require the cancelment of sub-leases, on the superior lease passing from the hands of the defaulter.

"We observe that, in the special appeal decided in this Court on the 18th September 1851, page 626, (Satcowree Mitter, appellant,) a point analogous to that now before us was determined. In that case, the plaintiff, who had purchased an under-tenure, sold in conformity with the provisions of Act VIII. of 1835, (subsequent, no doubt, to a summary decree for arrears,) sued, by virtue of his right as purchaser, to oust a sub-lessee, who held under a title acquired from the former proprietor of the under-tenure; but it was determined that Act VIII. of 1835 contained no provisions corresponding with those applicable to the sale of putnee talooks, as shown in Clause 1, Section XI. Regulation VIII. of 1819, and the suit was accordingly dismissed.

A surburakaree tenure, consisting of twelve villages, having been purchased by plaintiff when sold under a decree for arrears of rent under Regulation VIII. of 1835, plaintiff brings this suit to oust defendant from possession of one village, which had been assigned to him by the late surburakarakar.

Held that, as the collector (lawfully or not) sold only the rights and interests of the defaulter in the surburakaree tenure, plaintiff was not competent to disturb the assignment made by the defaulter in favor of defendant.

"This decision was not brought under our notice when before we heard this case ; and as we have come to an opposite conclusion from that adopted by three judges of this Court in 1851, we think the point should be again considered.

"Mr. Money seemed also to attach some importance to the plea that the sub-surburakaree, of which the petitioner was the possessor, should not, properly speaking, be considered a sub-tenure. It is said that the petitioner was not subordinate to the surburakar, and that, though he paid his rent through him, he was on the footing, as we understood, of co-equality in point of right. But we apprehend that the admitted facts of the case are against this plea. First of all stood the person, in the position of zemindar, by whom the public revenue is paid to Government. Next, under him, came the surburakar, Gudadhur, holding twelve villages. And, lastly, one of these villages has been assigned by the surburakar to the present petitioner. But the party liable to the zemindar for the annual rent is the person in possession of the twelve villages. Against him alone the summary decree was pronounced ; and it was the express condition of the petitioner's tenure that he should pay his rent through the surburakar, Gudadhur. We can conceive Gudadhur to have made petitioner joint surburakar with himself, either by assigning to him a perpetual share of the whole surburakaree, or by entitling him to pay the rent of the village assigned to him as a co-ordinate surburakar. But, as the matter stands, against Gudadhur as occupant of the whole twelve villages, the summary decree is admitted to have been pronounced, and the right of occupancy of Gudadhur over the whole tenure, as recipient of the rent thereof, was sold. For these reasons, therefore, it seems to us we have not, in our judgment, mistaken the footing upon which the petitioner, Bulbhuddur, stood towards Gudadhur ; but, taking the fact to be that he is the under-tenant of the surburakar, we admit the review that the legal competency of the plaintiff to oust him from his tenure may be reconsidered."

JUDGMENT.

Mr. A. Sconce.—The particulars of this case will be found recorded in the judgment passed on the 26th November 1857 (page 1674). Subsequently, on the 10th August 1858, (page 1405 of Reports,) the special appeal was admitted for re-hearing with respect to the legal competency of plaintiff, purchaser of a surburakaree tenure when sold under Act VIII. of 1835, in execution of a summary decree for arrears of rent. This decree had been pronounced against Gudadhur, the person in occupation of the tenure ; and that the sale took effect under Act VIII. of 1835, and the right of occupancy has been transferred to the purchaser, we have no contest. We

have now only to consider whether the legal effect of the sale is such as to entitle the purchaser, plaintiff, to oust the defendant, Bulbhuddur Misser, from a subordinate surburakaree tenure of one out of the twelve villages purchased by plaintiff, which had been assigned to him by the late occupant of the superior tenure, Gudadhur. The majority of the Court were of opinion at the original hearing that, as the surburakaree tenure had passed by public sale in consequence of the default of Gudadhur to a new incumbent, the latter was competent to set aside the assignment made by Gudadhur. But on that occasion the decision pronounced by this Court on the 18th September 1851, in the case of Satcowree Mitter, was not brought under our notice. It was there clearly ruled, that a sale held under Act VIII. of 1835 did not convey to the purchaser the power of setting aside under-tenures situated within the tenure sold; and, accepting that ruling as a precedent, I would apply it in the present case.

Messrs. H. T. Raikes and G. Loch.—When this special appeal was tried on the 26th November 1857, a majority of the Court held that the position of Bulbhuddur, the party in possession of the villages of Nultiparrah, was that of sub-lessee under Gudadhur, the surburakar, and that the sale which transferred the surburakaree rights of Gudadhur to the purchaser (the special appellant) gave him the power to restore the surburakaree tenure to its original entirety, and, consequently, to oust any sub-lessee created by the late incumbent.

A review of that judgment has been granted on the ground that, even allowing the position of Bulbhuddur to be that of sub-lessee, still, as the sale was held under Act VIII. of 1835, and that enactment "contained no provisions corresponding with those applicable to the sale of putnee talooks, as shown in Clause 1, Section XI. Regulation VIII. of 1819," the sale of the superior tenure would not convey to the purchaser the right of cancelling all intermediate incumbrances created by the old proprietor; and, on a precedent to this effect, of the 18th September 1851, Mr. Sconce now holds that the claim to set aside the special respondent's tenure should be rejected, and the special appeal dismissed.

We concur with Mr. Sconce in the propriety of dismissing the appeal, but would not make the provisions of the law referred to a question in this case.

There is no doubt that the collector put up for sale the *rights* of Gudadhur, as evidenced by the proceedings held by the collector at the time. It may be a question, whether the collector could lawfully sell rights and interests of a lessee in lieu of the tenure itself in satisfaction of a decree for rent. But the validity of the sale as a sale is not questioned. The only point mooted is, what was put up for sale, and what passed to the purchaser. This point is determinable, not by considering what the collector, in a sale for

arrears of rent, ought to have sold, but what, in the particular sale made by him, he did sell.

On this point the lower court agrees that only the *rights and interests* of the defaulter were advertised and put up for sale, and on this ground the previous transfer of Gudadhur's rights in Nultiparra, made with the sanction of the zemindar, was held exempted from the effect of this sale, and Bulbhuddur was declared entitled to keep possession of that village.

We agree with the courts below, that this is the proper construction to put upon the effect of such a sale, and that the special appellant can be entitled to no more than the conditions of the sale advertisement notified for sale. For the above reasons we concur with Mr. Sconce in rejecting this special appeal, with costs.

THE 2ND APRIL 1859.

H. T. RAIKES, Esq., Judge, and H. V. BAYLEY, Esq., Officiating Judge.

Petition No. 1880 of 1858.

Application for Special Appeal from the decision of Mr. S. DaCosta, Officiating Principal Sudder Ameen of Purneah, dated 24th September 1858, affirming that of Syud Akbar Alee, Moonsiff of Ramnuggur, dated 3rd June 1858, in the case of

Mr. H. Cave, *Plaintiff,*
versus

Thutroo Pasban and others, *Defendants,* Petitioners.

Syud Murhumut Hossein, for Petitioners.

Mr. R. T. Allan, for the Opposite Party.

It is hereby certified that the said application is granted on the following grounds.

Petitioner's appeal was struck off by the lower appellate court, because the petitioner had not filed his grounds of appeal within the period prescribed for filing an appeal from a moonsiff's decision; but this case comes within the ruling of this Court, as laid down on the 10th August 1858, in the case of Hubeeboonissa, petitioner, and we therefore remand the case to the appellate court to be tried on the merits.

The respondent has appeared by vakeel.

THE 4TH APRIL 1859.

J. H. PATTON, Esq., Judge, and E. A. SAMUELLS, Esq., Officiating Judge.

Petitions Nos. 1286, 1287, and 1288 of 1858.

Applications for Special Appeal from the decision of Mr. H. S. Thompson, Principal Sudder Ameen of East Burdwan, dated 26th May 1858, affirming that of Baboo Judoonath Mullick, Sudder Moonsiff of that district, dated 29th January 1858, in the case of

Joykishen Mookerjee and others, *Plaintiffs,*
versus

The Collector of East Burdwan, *Defendant,* Petitioner.

Baboo Ramapersad Roy, for Petitioner.

It is hereby certified that the said applications are granted on the following grounds.

These cases are connected with No. 307 and from No. 758. to No. 765, remanded for re-trial on the 22nd June 1858, and case No. 343, remitted on the 20th September 1858. As these several remands have been made for the purpose of ensuring uniformity of decision, this case is also remanded.

THE 4TH APRIL 1859.

C. B. TREVOR, Esq., Judge, and G. LOCH, Esq., Officiating Judge.

Petition No. 1449 of 1858.

Application for Special Appeal from the decision of Mr. W. S. Seton-Karr, Officiating Judge of Jessore, dated the 9th June 1858, reversing that of Baboo Woomachurn Mitter, Moonsiff of Kalloopole, dated 14th December 1857, in the case of

Ramchunder Roy and others, *Plaintiffs,* Petitioners,
versus

Jadubchunder Roy and others, *Defendants.*

Baboo Dwarkanath Mitter, for Petitioners.

Baboo Kishensukha Mookerjee, for Defendants.

It is hereby certified that the said application is granted on the following grounds.

It appears that the zemindar Jadubchunder Roy sued Ramchunder Roy and Tyluknath Roy for the arrears of rent of 1252 B. S., and obtained a decree against them. The decree was founded on the jumma-wasil-bakee papers of that and previous years. A kuboolyut, alleged to have been executed in 1252, was also filed, but its

Case remanded, in order that the alleged minority of one of the defendants to the summary suit, who was sued personally and not by his guardian, at the

time the rents accrued, for which that suit was brought, may be enquired into. If he were then a minor, the suit brought against him personally must be dismissed. If he were then of age, the judge will pass such a decision as may seem just and proper.

execution was not proved ; the names appearing on it were those of Ramchunder Roy and Hurrosoonderee, as guardian of her minor son Tyluknath.

Hurrosoonderee, on behalf of Tyluknath Roy, minor, and Ramchunder Roy, then brought a regular suit to reverse the summary decree, urging that, when the kuboolyut which was propounded was executed, both Ramchunder and Tyluknath Roy were minors, and, consequently, that the summary suit founded on such a deed was illegal. It was alleged moreover that Tyluknath was at the present date a minor, though Ramchunder had reached his majority in 1257.

The moonsiff for various reasons gave plaintiff a decree, reversing the summary suit.

The judge of Jessore, taking this case up with another, which, on the 2nd April 1858, had, on the special appeal of the zemindar, Jadubchunder Roy, been remanded by this Court, for proof of the genuineness of the kuboolyut executed by Ramchunder and Hurrosoonderee in 1252 Bysakh, on behalf of the minor Tyluknath, reversed the decree of the lower court.

The petitioners, plaintiffs below, now appeal specially, urging that the decision of the judge is defective, inasmuch as he takes no notice of their allegation, that the summary suit was founded on a document executed by a minor, and that the summary decree is against two minors on the basis of that document. The summary suit, we observe, was for rent of 1256, and it was founded on jumma-wasil-bakee papers as well as on the kuboolyut. As Ramchunder Roy confessedly obtained his majority in 1257, and the summary suit was for rent of 1262 B. S., and was founded upon jumma-wasil-bakee papers of years subsequent to the date of his coming of age, showing that during them the collections had been at the rate entered in the kuboolyut, it is clear that the order of the judge, reversing the decision of the moonsiff and confirming the summary decree as to him, will stand. But regarding the minority of Tyluknath Roy, either at the time of the passing of the summary decree, or at the present time, no finding has been come to by the judge : his decision, therefore, as regards this person, is defective. We, therefore, remit the case to him, with instructions that he will enquire whether in 1262 Tyluknath Roy was a minor or not. If he were, then the summary suit brought against him personally, and not against his guardian, must, as regards him, be reversed. If he were of age in that year, the judge will then pass such a decision in this case as may seem to him to be just and proper.

THE 5TH APRIL 1859.

H. T. RAIKES and A. SCONCE, ESQs., Judges, and H. V. BAYLEY, ESQ.,
Officiating Judge.

*Regular Appeals from the decision of Baboo Peareemohun
Banerjee, Principal Sudder Ameen of Beerbhoom, dated
13th November 1856.*

Case No. 678 of 1856.

Rungunee Debea, mother and guardian of Juggutchunder and
another, (Defendant,) *Appellant,*

versus

Soondersoonderee Debea, (Plaintiff,) and others, (Defendants,) *Respondents.*

*Baboo Ramapersad Roy and Kishenkishore Ghose, for Appellant.
Baboo Shumbhoonath Pundit and Moonsee Ameer Alee, for
Respondents.*

Case No. 23 of 1857.

Bistoochunder Chuckerbuttee and others, (Defendants,) *Appellants,*
versus

Soondersoonderee Debea, (Plaintiff,) and others, (Defendants,) *Re-
spondents.*

*Baboo Bhoobunmohun Roy and Mr. R. T. Allan, for Appellants.
Baboo Kishensukha Mookerjee, for Respondents.*

Suit valued at Rupees 9268-6a.-9g.-3c.

WE are told by appellant's pleader that the following are the facts of this case. That Anundochunder Roy Chowdree had four sons, of whom Issurchunder and Kissenchunder are alone concerned in this case; that the plaintiff is the widow of Kissenchunder, and she, on the averment that she and her daughter are the heirs of Kissenchunder, sues for possession of 3a.-13g.-1c.-1kt. share in lot Ruswah, and the same in mouzah Howda Mohoborah, &c., and to have his name registered in the collectorate for 1a.-2g.-2c. of lot Durka, the property of her late husband; that she states that her husband died on the 17th Kartikh 1250, and that she succeeded him in the possession of these estates, which she held possession of until 1261 or 1262, when dispossessed by the defendants. The pleader states that his clients, the defendants, deny any such possession on the part of the plaintiff, and allege that Kissenchunder did not die in Kartikh 1250, but in the month of Pous in that year, and that, previous to his death, on the 16th Kartikh of the same year he executed a kubala or deed of sale in favor of his brother Issurchunder, whereby he conveyed to him, in discharge of a debt of rs. 5000 owing by him to Issurchunder, his share in Ruswah and in Howda Mohoborah, &c., and

It not being shown that appellant's documents, a kubala and wuseetnamah, were genuine and authentic deeds, but reason being rather to the contrary, decree of lower court upheld, awarding to plaintiff possession of her lands as deceased's heir, with costs against appellant.

also at a subsequent date drew up and executed a wuseutnamah, constituting Issurchunder his proper executor, in which mention is made of the kubala, and that he had adopted Hurrishchunder, the son of Issurchunder, to succeed as his son ; that in accordance with these instruments Issurchunder had held possession of Kissenchunder's share in Ruswah and in the other villages referred to, from the date of the kubala, and denied plaintiff's right to have possession of them.

The pleader then submitted to us the evidence on which his clients relied to establish their right and title to the property. This consisted of the kubala dated the 16th Kartikh 1250, purporting to convey to Issurchunder the share of Kissenchunder in the property in suit. The deed professes to have been registered in Aughrun, but the pleader admits that he can show no power from Kissenchunder, authorising the registration on his part, nor any evidence to show that the deed was registered in the presence of any one on the part of Kissenchunder. But the pleader refers to a roobakaree of the collector, dated 31st July 1844, in which it is stated that Issurchunder, the treasurer, had represented that he had become, by virtue of the kubala, the proprietor of Kissenchunder's share in the property pledged as his security, and that, Kissenchunder being dead, he applied for registration in his own name as his heir, and that Joynarain Roy, the agent of Kissenchunder's widow, had assented to this representation, and that his name was registered accordingly for the Ruswah estate and the villages of Mohoborah and others, and also for Durka. And the pleader points to this proceeding as showing that, although the mutation of names was made with all publicity, notice being given in the locality of the estates, it brought forward no objection on the part of the plaintiff. Hence the pleader argues that the possession of Issurchunder must have been acquiesced in by the plaintiff, and that the long subsequent possession of his client is highly favorable to the presumption that the kubala was known to have been duly executed, and that, consequently, no opposition was offered to his clients' rights. The pleader, however, admits that there is nothing on the record to support the statement made in the roobakaree that Joynarain was authorised by the plaintiff to signify her acquiescence in the mutation thereby effected.

In addition to these documents we were shown the depositions of the witnesses who attested the kubala and the wuseutnamah above alluded to.

JUDGMENT.

We observe that the principal sudder ameen has placed no reliance on the evidence of the defendants' witnesses, or on the

documentary proof adduced by them, and has decreed the suit in favor of the plaintiff. He moreover holds that Kissenchunder is shown to have died on the 17th of Kartikh, as asserted by the plaintiff, the day following the alleged date of the kubala, and that, for a week or so before his death, Kissenchunder was not in possession of his faculties, and could not have executed the deeds in question ; that, consequently, the registration was subsequent to the decease of Kissenchunder, and cannot be held to be any corroboration of the deed, nor is it shown in refutation of this that he executed any power authorising the registration ; that as, at the time of the mutation of names in the collectorate, the widow was only sixteen years of age, the fact of the registration then made may have been easily kept from her knowledge ; and that, consequently, no inference hostile to her can be drawn from any omission on her part to oppose those proceedings.

The pleader on the part of the appellant admits that his client must establish the *factum* of the execution of the kubala, but argues that plaintiff's case is greatly weakened by her inability to show, by any reliable evidence, that she ever held possession of the property since her husband's death. There is, therefore, the improbability that she would have remained so long silent had she not been aware of the existence of the deed, and the evidence it gave of defendants' right. Before, however, according any weight to this argument of the appellant's pleader, we must consider whether defendant has supplied such evidence of the truth of this deed of sale, as he is bound under the circumstances to place on the record.

The deed is comprised on two pieces of stamp, one for rs. 12 and one for rs. 8, and the names of the subscribing witnesses are written on the lower piece of paper. These stamps were purchased at an interval of five years, and could not have been procured from the Government stamp vendors for the purpose of preparing on them this deed. There is, moreover, a manifest alteration in the date both of the numerals and the letters, and altogether the appearance of the deed is not in its favor. The witnesses speak to its execution, but do not all agree as to the writer of the instrument, and speak vaguely of the consideration having consisted of a debt due to Issur-chunder. They do not, however, hold such a position as can entitle them to immediate credit ; and corroborative evidence, such as defendants ought to have produced, is wholly wanting. It is true that the deed was registered in the month of Aughrun ; but while it is asserted that Kissenchunder was then alive, no evidence is given that any power of attorney was executed by him for this purpose, nor that the registration was effected in his presence. The mere registration therefore cannot be regarded as any proof of Kissenchunder's having really executed the deed ; and the fact that it was registered

without any intimation on his part of its authenticity is rather against than in favor of its genuineness. It simply shows that the deed itself had been prepared, but does not establish its validity, nor the credibility of the subscribing witnesses. On the same ground we can see no support of the defendants' case in the assumed acquiescence of the plaintiff at the time of mutation. No power of attorney is produced to authorise the assertion of Joynarain, that the plaintiff acquiesced in the registry of Issurchunder's name; and, looking at the age and position of the widow, we consider no publicity of this matter in the locality of the property can be held to have reached her knowledge, unless there is proof of the fact, which is here wholly wanting. There is nothing to support the evidence to the execution of the wuseeutnamah, and, being at a date subsequent to that on which plaintiff asserts her husband died, and of which there is proof on the record unrefuted by any evidence on the part of the defence, we coincide with the principal sudder ameen in rejecting that deed entirely.

Another kubala relating to Durka is said to have been executed by Kissenchunder in favor of Issurchunder, but, having got into the hands of Hurish, has not been produced; and we do not therefore further remark upon it, beyond observing that only one witness speaks to that transaction.

We feel perfectly satisfied that the lower court has rightly refused to uphold the deeds on which the defendants assert their right to hold this property against the plaintiff, and consider they have been able to make out no *prima facie* case, which requires the Court to enter upon such proof. As plaintiff has failed to support her assertion that she held possession for a time after her husband's death, until dispossessed by the defendants, there is no claim for wasilat previous to suit that requires this point to be adjudicated.

Regarding the appeal of the putneedar to be absolved from costs, we need only observe that, in addition to his right as putneedar, he has also asserted, as against the plaintiff, a mortgage of the zemindaree rights to himself by Greeschunder, under which he has claimed the right of appropriating all the profits of the estate in discharge of interest; he has also indiscriminately supported the defence, denying plaintiff's rights *in toto*. There is no doubt he, as holding possession as mortgagee of the proprietary profits, was a necessary party to the suit, and, as opposing plaintiff's claim, is liable, according to custom, for costs jointly with the others. We therefore see no reason to absolve him from the decree in this respect.

Another point was finally taken up by the defendant's pleader as to the irregularity of plaintiff in valuing her claim at rs. 4000 for the lands and rs. 5000 more to cancel the kubala, and claiming to be relieved from costs on the latter valuation; but we consider the case has not disclosed matter on which the defendants are

entitled to any indulgence. It is possible that the valuation on the lands sued for may have been sufficient, but the kubala certainly contains an assertion that her husband owed the defendant rs. 5000, and affords grounds for demanding its cancelment, and likewise for the precaution of including its assumed value as part of the valuation of the suit.

We therefore see no ground whatever for disturbing the judgment passed in this suit, and confirm it, with costs of these two appeals upon the appellants preferring them.

THE 5TH APRIL 1859.

H.T. RAIKES and A. SCONCE, Esqs., Judges, and H.V. BAYLEY, Esq.,
Officiating Judge.

Case No. 665 of 1856.

*Regular Appeal from the decision of Mr. George Loch, Judge
of Purneah, dated 8th July 1856.*

Beebee Sukeena, representative of Sheik Muqseutoollah, (Plaintiff),
Appellant,
versus

Baboo Doolar Singh and others, (Defendants,) *Respondents.*

*Baboos Ramapersad Roy and Kaleeprosunno Dutt and Mr. R.
T. Allan, for Appellants.*

Moulvee Syud Murhumut Hossein, for Respondents.

Suit valued at Rupees 22,690-2.

THIS suit was brought by plaintiff to give effect to a deed of compromise, whereby, on the 7th Kartikh 1250, a suit instituted by plaintiff against defendants was adjusted. In the first instance the original plaintiff had had dealings with the defendants, and others not parties to the present compromise, in the course of which he had advanced considerable sums to them jointly, to enable them, as appears, to carry on a suit for the recovery of an estate, which was eventually decided in their favor. In consequence of an arrangement made between all the parties, however, as one-fourth of this

This suit, brought to enforce an instalment bond executed for Rs. 18,400 in adjustment of a debt due for rs. 42,780, was disposed of by the zillah judge in two distinct forms, that is, by an order of dismissal and by an order of nonsuit.

It was considered first, that the suit should be dismissed because the same cause of action had been disposed of on its merits on 31st August 1853 : but on this appeal, without entertaining the question that might arise as to the identity of the cause of action in both suits, it was held that, as the first suit was nonsuited in this Court, in reversal of the zillah decree of August 1853, this second action was necessarily admissible.

Second, it was considered by the zillah judge that the claim should be nonsuited, because, as the instalment bond provided that, on failure of payment, the full debt should be exigible, plaintiff should have sued upon the old debt and not upon the lesser sum for which the adjustment had been effected ; but the Court reserving any opinion as to the competency of plaintiff, who had definitely accepted a lesser sum, to bring an action by way of penalty for the larger debt, was of opinion that, as plaintiff had elected to stand by the compromise and not enforce the penalty, the form of his action did not warrant an order of nonsuit.

estate fell to plaintiff's share, he became chargeable with one-fourth share of the costs incurred ; and, accordingly, the share due by the present defendants on that account, as well as for other advances, was definitively ascertained to amount to rs. 42,780-8-1, and for this sum a bond was executed by defendants on the 28th Phagoon 1247. Subsequently plaintiff brought an action upon this bond, and it was the action thus specifically brought, which, as already said, was disposed of by the compromise, the enforcement of which forms the subject of the present suit.

The zillah judge has held the action to be inadmissible on two distinct grounds : *first*, he has held that the suit must be dismissed, because the same matter had formed the subject of another action, which was disposed of on the 31st August 1853 ; and, *second*, that plaintiff must be nonsuited, because he sued contrary to the terms of the compromise or kistbundee on which it was professedly based.

As to the first of these grounds, we observe that, whatever may be said as to the effect of the zillah decision of the 31st August 1853, at the time the judge's decree was in this case made, that earlier decision is no longer applicable. In this Court, on appeal, the decision of 31st August 1853 was, on the 30th January 1858, set aside, and the suit nonsuited. In effect, therefore, the earlier suit has gone out of court altogether, without the adjudication of any issue which, on the principle of *res judicata*, can stay the hearing of the present case on its merits. The other suit recited, and was apparently based upon, the advances originally made to the present defendants, as well as to the other parties who jointly had carried on a litigation for the recovery of the estate above alluded to ; and Baboo Ramapersad, for appellant, was prepared to contend that the circumstance of the present action being laid exclusively on the compromise of 7th Kartikh 1250, gave a new and distinct character to the suit. But without entering into that question, we are satisfied that the reversal of the zillah decree of 31st August 1853, by an order of nonsuit in this Court, removes the bar which the zillah judge held to operate against the trial of the suit.

Second, as to the present order of nonsuit. It appears that, in the compromise of 7th Kartikh 1250, executed for the sum of rs. 18,460, it was stipulated that, if the defendants should default in making the payments therein provided, the plaintiff should be entitled to fall back on the bond of 28th Phagoon 1247, for rs. 42,780-8-1. Accordingly, the judge has held the action to be wrongly brought, inasmuch as the plaintiff was bound to sue for the sum of rs. 42,780, as determined by the bond, and could not sue for the lesser sum due to him under the kistbundee for rs. 18,460, as determined by that deed. But it appears to us, that it was not competent to the judge to require the plaintiff to sue for a larger

sum if he were satisfied with a less. The compromise of 7th Kartikh 1250 (supposing no question to arise as to its execution and its obligatory character) is good at all events for the lesser sum ; and whether the plaintiff, having definitely accepted that sum, may fall back by way of penalty on the larger sum, is a question of great importance, upon which we need offer now no opinion. But under any circumstances, as the plaintiff has elected to stand by the compromise, and not enforce the penalty, the form of his action does not warrant an order of nonsuit. We reverse the judge's decision and remand the case for trial.

THE 5TH APRIL 1859.

C. B. TREVOR, Esq., Judge, and G. LOCH, Esq., Officiating Judge.

Petition No. 1924 of 1858.

Application for Special Appeal from the decision of Mr. W. S. Seton-Karr, Officiating Judge of Jessore, dated 14th September 1858, reversing that of Baboo Woopendurchunder Nyaruttun, Principal Sudder Ameen of that district, dated 23rd February 1858, in the case of

Rajah Burdakant Roy, Plaintiff,

versus

Ramdhun Holdar, (Petitioner,) and others, Defendants.

Baboo Jugudanund Mookerjee, for Petitioner.

Baboos Kishenkishore Ghose and Obhoychurn Bose, for Plaintiff.

IT is hereby certified that the said application is granted on the following grounds.

Plaintiff sued on an alleged mouroosee title obtained by Issan Ghose and others for some rent-free lands, scattered over ten villages, but resumed and made up into one mehal.

The principal sudder ameen dismissed plaintiff's claim. On appeal, the judge observes that, although a mouroosee grant is put into court, still from a kuboolyut, dated 24th Assin 1249, and other documents, and the depositions of witnesses, it is proved that the rajah had *de facto* possession. After sundry other remarks, the judge concludes thus : "In the above view, seeing that the plaintiff, though he mentions his mouroosee lease, only asks for possession by the reversal of the Act IV. of 1840 case, I adjudge him his prayer on appeal. Nothing in this suit bars the defendant, Ramdhun, from taking any steps as to his rents, nor is any judgment passed

Held, that the special appellant is entitled to retain the possession awarded to him under Act IV. of 1840 until a party proves a right to possession superior to his ; and that, consequently, the decision of the judge, which has looked only to the fact of possession on the part of the plaintiff previously to the institution of the suit under Act IV. of 1840, cannot stand.

Case remitted, in order that the judge may enquire into the plaintiff's right to possession under a mouroosee lease, as claimed by him in his plaint.

on a mouroosee pottah not before the court. The Act IV. suit is reversed, and that is all, and the present appeal is decreed, with costs."

Defendant now urges, that he, being in possession under Act IV., is entitled to retain that possession, until another party proves his *right* to possession in a civil court; that the plaintiff in this case stood upon his mouroosee right, and the judge, instead of giving an opinion one way or other as to his right to possession, has reversed the Act IV. of 1840 case, looking only to the fact of possession by the rajah before the passing of the order under that Act; that such an order is illegal, and the matter should be remanded for a clear determination of plaintiff's right to possession 'as alleged by him.

We think there can be no doubt that the defendant is entitled to retain the possession awarded to him under Act IV. of 1840, until a party proves a right to possession superior to his; and that, consequently, the decision of the judge, which has looked only to the fact of possession on the part of the rajah previously to the institution of the suit under Act IV. of 1840, cannot stand. We, therefore, remit the case to him, with directions that he will enquire into the plaintiff's right to possession under a mouroosee lease, as claimed by him in his plaint, and pass eventually such a decision as the justice of the case may seem to require.

THE 5TH APRIL 1859.

A. SCONCE and C. B. TREVOR, Esqs., Judges, and H. V. BAYLEY, Esq.,
Officiating Judge.

Case No. 434 of 1858.

Special Appeal from the decision of Mr. W. T. Trotter, Judge of Mymensing, dated 10th December 1857, affirming a decree of Baboo Kallykinkur Roy, Sudder Ameen of that district, dated 28th May 1857.

Bhowaneedeen Sookool, (Defendant,) *Appellant,*
versus

Aymanchand Beebee, (Plaintiff,) *Respondent.*

Baboo Unookoolchunder Mookerjee and Kaleeprosunno Dutt, for
Appellant.

Moulvee Ahmed Alee, for Aymanchand Beebee, and Baboo Kishensukha Mookerjee and Moonsshee Ameer Alee, for Nusseeb Reza, representative of Plaintiff, Respondent.

THIS case was admitted to special appeal on the 14th June 1858, under the following certificate recorded by Messrs. C. B. Trevor and H. V. Bayley.

A, having voluntarily interposed to stay a sale about to be made in execution of the rights and interests of a judgment debtor in certain property, by paying in the money due by the debtor, has brought this suit to recover the money so paid.
Held, that the action will not lie.

"Bhowaneeden Sookool, petitioner, held decrees against one Ibrahim Khan, the husband of the plaintiff, Aymanchand Beebee. In execution of those decrees, certain property, which had been claimed by plaintiff as her own, under a deed of dower, and which, in a suit between herself and her daughter, Oomut-ul-Zohura, had by compromise passed into her possession, was attached, and the rights and interests of Ibrahim Khan were advertised for sale. Plaintiff then, of her own accord, paid the sum due under the decree, and she now sues for the recovery of the same.

"The lower courts have given her a decree for the same.

"It is now urged by petitioner that, as only the rights and interests of Ibrahim Khan were sold, and as plaintiff on her own statement did not inherit from him, and alleges that Ibrahim Khan had no right in the property, her payment was voluntary ; and under the precedent of the 19th May 1857,* in the case of Ramchunder, the suit will not lie.

"It seems that, under the allegations of plaintiff, the payment on her part was purely gratuitous ; only the rights and interests of Ibrahim Khan were advertised for sale ; and as plaintiff's rights were unconnected with him, there was no legal necessity for her making the payment. Under this view we admit the special appeal to try whether the decision of the lower court should not be reversed."

JUDGMENT.

In concurrence with the judges who admitted this appeal, and with the case disposed of on the 19th May 1857, (page 868,) we think that this action will not lie. Plaintiff, respondent, voluntarily interposed to stay the sale of the rights and interests of a judgment debtor in certain property. By her tender of the money due by the judgment debtor, the decree-holder was prevented having recourse to the remedy which would otherwise have been available to him for the recovery of his debt ; and it seems to us that it is not competent to the plaintiff to demand, by this action, the repayment of the money which, of her own choice and for a specific purpose, that is, to stay the sale, she paid. We reverse the decision of the zillah judge, and dismiss the suit, with costs.

* Decisions of 1857, page 868.

THE 6TH APRIL 1859.

C. B. TREVOR, ESQ., Judge, and E. A. SAMUELLS and G. LOCH, ESQS.,
Officiating Judges.

No. 698 of 1856.

*Regular Appeal from the decision of Mr. J. Weston, Principal
Sudder Ameen of Tirhoot, dated 14th June 1856.*

Musst. Meena Koowur and others, (Plaintiffs,) *Appellants,*
versus

Musst. Rajoo and others, (Defendants,) *Respondents.*

Mr. R. T. Allan and Moonshree Ameer Alee, for Appellants.
Baboos Kishenkishore Ghose and Shumbhoonath Pundit, for Re-
spondents.

Suit laid at Rupees 9774-12-3.

THIS suit is brought to establish a title to 130 beegahs out of 380 in mouzah Rumoulee, a dependency of talook Kuryul, with mesne profits and interest from the date of dispossession.

A village, belonging originally to one of plaintiffs' ancestors, had been granted by him as roonumaiee to a relative who, in 1839, sold it to defendants. In 1842 another ancestor sued to establish the invalidity of the grant, but his suit was dismissed. In that suit he admitted defendants to be in possession of the entire area of the village. In 1843, defendants having sued for separation of the village from plaintiffs' talook and

determination of their share of the assessment of the talook, the principal sudder ameen assumed on oral evidence that the area of the village contained 250 beegahs, and fixed the assessment accordingly. In 1847 the survey officers ascertained the area to be 380 beegahs. Plaintiff now sues for the difference—130 beegahs, alleging that it had been decided the village only comprised 250 beegahs. that the defendants had dispossessed him of 130 beegahs in 1252, and that, as owner of the parent talook, he was entitled to all land in excess of the 250 beegahs. The principal sudder ameen held the suit barred by limitation. Plaintiff then appealed on the ground that the principal sudder ameen, by confining him to the single issue of limitation, had prevented him from adducing proof of dispossession. Held, that the issue obviously required proof from him of possession within twelve years, and that the principal sudder ameen's erroneous estimate of the issue in 1843 was immaterial. Plaintiff's case dismissed on his failure to prove either that the grant was limited to 250 beegahs or that he had been in possession within the period of limitation.

The plaintiffs are Musst. Meena Koowur, widow of Rai Mahtab Ram, who was the son of Rai Pursad Ram and Rai Kalika Suhæe and Doorga Suhæe, sons of Rai Kooldeep Ram, who again was the son of Nirud Ram, the brother of Pursad Ram. They are joint-owners of the talook of Kuryul, and they found their suit on the following allegations. They say that the village of Rumoulee was the self-acquired property of Rai Pursad Ram; that Pursad Ram gave 250 beegahs of this village as roonumaiee to his relative Rai Koolwunt Singh; that this land passed by inheritance into the hands of Ublakee Koowur, the widow of Soolwunt Singh, and sister-in-law of Koolwunt Singh, and was sold by her to Mooteeram Pundit, the ancestor of the defendants; that it was determined in a suit between the parties, decided on the 28th June 1843, that the defendants were only entitled to 250 beegahs, but that, nevertheless, they had dispossessed the plaintiffs on the 1st Assin 1252 of the remaining 130 beegahs, which they, the plaintiffs, had up to that time possessed, and from which they had annually

received rent in kind. The dispossession, it is said, was effected by inducing the ryots to withhold the zemindar's share of the produce from the plaintiffs, and to pay it to the defendants instead.

The reply of the defendants is, that Rai Pursad Ram gave the entire area of Rumoulee to Rai Koolwunt Singh; that their ancestor purchased the whole village from his heir, Musst. Ublakee Koowur, on the 18th March 1839; and that their family has ever since continued in undisturbed possession. On the 12th of February 1842, Rai Kooldeep Ram, ancestor of two of the plaintiffs, brought an action, they observe, against the defendants' ancestor, Moteeram Pundit, for the recovery of the entire village of Rumoulee, which he alleged Rai Pursad Ram had no right to bestow in gift; and this suit, in which he admitted the defendants' ancestors to be in possession of the whole 16 annas of the village, was dismissed on the 28th June 1843, upon the ground that it was barred by the statute of limitations. They deny that the suit brought by Moteeram Pundit against the ancestors of the plaintiffs, which was also decided on the 28th June 1843, in any way supports the plaintiffs' claim. That suit, they observe, was brought for the purpose of obtaining a separation of the village from the talook, and determining the share of the general assessment on the talook which the owner of Rumoulee was to pay. A question arose in this suit as to the area of Rumoulee. The court came to the conclusion, on the evidence of witnesses, that it was only 250 beegahs, and accordingly decreed a proportionate assessment; but the plaintiff in that suit alleged the area to be 500 beegahs, and the survey officers ascertained in 1847 that it was 380. There was no dispute as to the ancestors of the present defendants being in possession of the entire village; and the decision of the court on the question of the area, being based entirely on oral evidence, was inaccurate. This inaccuracy, however, it is contended, cannot affect the right of the defendants to the entire area of Rumoulee, whatever that may be. The plaintiffs, they declare, never thought of questioning their possession of the entire area of Rumoulee, until the discrepancy between the survey measurement and the estimate of the court in 1843 gave them a pretext for reviving in a new form the suit of their ancestor, Kooldeep Ram, which had already been dismissed. They accordingly plead in bar of the suit the statute of limitations and the provisions of Section XVI. Regulation III. of 1793.

The principal sudder ameen found that the plaintiffs had entirely failed to prove either possession or dispossession since the date of the defendants' deed of sale, in 1839; and, observing that the plaintiffs' ancestors had, in 1842, admitted the possession of the defendants in the entire village under the deed of sale, he held that the plaintiffs' cause of action arose on the date of that document,

and that their suit was consequently barred by the statute of limitations.

In appeal, it is urged for the plaintiffs that, in consequence of the principal sudder ameen's having called for proof on one point only, *viz.* that of limitation, instead of generally on all the points involved in the case, as it is contended he ought to have done, the plaintiffs were placed at a disadvantage, and had no opportunity of proving their possession previous to 1252. Their omission to do so is, however, they contend, immaterial, as they are the acknowledged owners of the talook of which Rumoulee is a dependency, and are entitled to everything in excess of the 250 beegahs which, it was formally decided in 1843, comprised the entire area of that village.

We do not attach any weight to the objection which the plaintiffs found on the fact of the principal sudder ameen's having called, in the first instance, for proof of their suit having been brought within the period of limitation. It has not been explained to us what evidence, oral or documentary, was excluded by this course; and it is evident that, by the issue thus raised, the plaintiffs were invited to prove, if they could, both that the original grant given by Rai Pursad Ram only covered 250 beegahs, and that Ublakee Koowur's deed of sale could consequently convey no more, and that they had been in possession of the 130 beegahs sued for subsequent to the deed of sale, and were dispossessed, as they alleged, in 1252. No attempt was made, however, to establish either of these points. The plaintiffs relied entirely on the decision of the 28th June 1843, in the case of Moteeram Pundit, for the purpose of establishing that plaintiffs were only in possession at that date of 250 beegahs, and were entitled to no more. This decision, however, is altogether unfavorable to the plaintiffs' claim, for it treats the entire area of Rumoulee as the property of the defendants; and in the absence of any proof on the part of the plaintiffs, that the defendants encroached on their lands between the date of that decision and the year of the survey (1847), or that they were confined by the terms of the grant to 250 beegahs, we must conclude that this area was, as ascertained at the survey, 380 beegahs, and that the principal sudder ameen's estimate of 250 beegahs was erroneous. It would, doubtless, have been more satisfactory, had the principal sudder ameen called for the original grant of Rai Pursad Ram, and ascertained what it actually covered; but it does not appear that the plaintiffs themselves called for the production of this document; and they have entirely failed to show any cause of action within the period of limitation allowed by law. We therefore confirm the decision of the principal sudder ameen, and dismiss the appeal, with costs.

THE 6TH APRIL 1859.

H.T. RAIKES and A. SCONCE, ESQS., Judges, and H. V. BAYLEY, ESQ.,
Officiating Judge.

Case No. 328 of 1858.

Special Appeal from the decision of Mr. E. S. Pearson, Additional Judge of Dacca, dated 30th November 1857, affirming a decree of Moulvee Naziroodeen Mahomed, Principal Sudder Ameen of that district, dated 23rd March 1857.

Rammohun Banerjee, (Plaintiff,) *Appellant,*
versus

Brijonath Roy and others, (Defendants,) *Respondents.*

Baboo Dwarkanath Mitter and Unookoolchunder Mookerjee, for Appellant.

Baboo Shumbhoonath Pundit, for Bishessurree Dasse, Respondent.
Baboo Bungseebuddun Mitter, for Shamachurn Bhuttacharj, another of the Respondents.

THIS case was admitted to special appeal on the 14th May 1858, under the following certificate recorded by Messrs. B. J. Colvin and A. Sconce. The lower appellate court held this action to be barred by a decision pronounced in an earlier suit relative to the same subject matter; but as the earlier decision nonsuited the plaintiff, the present action is necessarily admissible.

"Petitioner, plaintiff, instituted this suit to acquire possession of certain property under a foreclosed mortgage. Once before he claimed the same land, on the ground that the transaction imported an absolute sale; but when the case came in appeal before the additional judge of Dacca, on the 16th January 1852, he held that the sale was no more than conditional, and the plaintiff could legally obtain possession only under Regulation XVII. of 1806.

"The present suit has been dismissed by the principal sudder ameen: but on appeal the judge has declined to enter into the merits. He says that possibly the meaning of the additional judge, in his decision of 16th January 1852, may have been to nonsuit plaintiff; but as in his order he affirmed the principal sudder ameen's order of dismissal, that order must preclude the entertainment of this new action.

"The ground of special appeal is, that the zillah judge has misapprehended the terms of the decision of his predecessor in 1852. We can entertain no doubt upon this point. Not only did the judge in the words above quoted expressly recognize the competency of plaintiff to bring a new action, thus giving to his own decision the effect of a nonsuit, but he also declared that he altered the decision of the principal sudder ameen to the extent indicated by him.

"We admit the special appeal to try whether the decision of the zillah judge should not be set aside and the case be remanded for hearing upon the issue raised."

JUDGMENT.

We are clearly of opinion, upon the grounds shown by the admitting judges, that the decision pronounced by the additional judge, on the 16th January 1852, was of the nature of a nonsuit, and expressly contemplated the institution of another action. We therefore reverse the judge's decision, and remand the case that the appeal may be disposed of on its merits.

THE 6TH APRIL 1859.

C. B. TREVOR, ESQ., Judge, and E. A. SAMUELLS and G. LOCH, ESQS.,
Officiating Judges.

Case No. 209 of 1858.

Special Appeal from the decision of Mr. E. Latour, Officiating Judge of 24-Pergunnahs, dated 21st March 1857, affirming a decree of Mr. S. Wright, Moonsiff of Maniktollah, dated 26th November 1856.

Junnumjoy Mitter, (Plaintiff,) *Appellant,*
versus

Robert Pereira, and after his demise J. Pereira and others, sons of the deceased, (Defendants,) *Respondents.*

Baboos Dwarkanath Mitter and Baneemadhub Banerjee, for Appellant.

Baboos Sreekant Singh and Romanath Bose, for J. Pereira and others, Respondents.

Baboo Unookoolchunder Mookerjee, for Abdur Ruheem, Respondent.

Held, that all landholders are competent to enhance rents, and that this privilege is not confined to auction purchasers, and that Section IX. Regulation V. of 1812 prescribes the steps to be taken by landholders generally before a tenant becomes liable for enhanced rent.

THIS case was admitted to special appeal on the 31st March 1858, under the following certificate recorded by Messrs. B. J. Colvin and J. S. Torrens.

"This was a suit instituted by an alleged lessee of certain lands in Punchungram to assess lands in occupation of the defendants, stated to be within the precincts of his lease. The moonsiff dismissed the case in acceptance of the defence set up, that defendants' lands were not a dependency of the plaintiff's tenure. The judge, on appeal from plaintiffs, without going into this question, has decided that, because the plaintiff was not an auction purchaser, or a party whom he held entitled to sue for assessment under the provisions of Regulation V. of 1812, his suit was liable to dismissal.

"We admit the special appeal, to try whether the legal grounds assigned by the judge for dismissing the suit be valid."

JUDGMENT.

We agree with the admitting judges, in considering the legal grounds assigned by the judge for dismissing the petitioner's suit, to

be incorrect. We consider that all landholders are competent to enhance rents, and that this privilege is not confined, as supposed by the judge, to auction purchasers; and we hold that Section IX. Regulation V. of 1812 is of general import, and prescribes the steps to be taken previous to a tenant's being rendered liable for the payment of enhanced rent, whether the party so seeking to enhance it be an auction purchaser or ordinary zemindar. We therefore remand the case to be tried on its merits.

THE 6TH APRIL 1859.

C. B. TREVOR, Esq., Judge, and E. A. SAMUELLS and G. LOCH, Esqs.,
Officiating Judges.

Case No. 600 of 1858.

Special Appeal from the decision of Mr. H. S. Thompson, Principal Sudder Ameen of East Burdwan, dated 22nd February 1858, affirming a decree of Moonshee Koodrutoollah, Moonsiff of Bamunara, dated 23rd March 1857.

Muthooranath Banerjee, (Plaintiff,) Appellant,
versus

Cazee Khoda Newaz and others, (Defendants,) Respondents.

Baboo Mohendrolal Shome, for Appellant.

Baboos Ramapersad Roy and Ashootosh Dhur, for Khoda Newaz, Respondent.

This case was admitted to special appeal on the 22nd September 1858, under the following certificate recorded by Messrs. C. B. Trevor and H. V. Bayley.

“Plaintiff, special appellant, sued Cazee Khoda Newaz for the rents in arrear from 1250 to 1257, amounting to 129-8, with interest, alleging that the cazee, who is a sharer with him in the talook, purchased in execution of a decree the jotedaree interest of his debtor, Ramsebuk Chuckerbuttee, in the benamee of Gorachand, and has ever since been in possession enjoying the profits of the land. Defendant denies the purchase, and pleads that one Soorjee Mullick is in possession as Gorachand's heir, and ought to have been sued. The moonsiff dismissed the case. On appeal the principal sudder ameen held that, according to the requirement of Section X. of Regulation VIII. of 1831, plaintiff ought to have taken a kuboolyut before consenting to acknowledge the defendant as jotedar, and that the papers are so tampered with that he need not fully

The principal sudder ameen having dismissed a suit for arrears of rent on the ground that, according to Section X. Regulation VIII. of 1831, a kuboolyut was essential, and that the fact of plaintiff's exhibits having been tampered with rendered it unnecessary to enquire into the fact of the defendant's possession of the tenure, and having refused to

summon the defendant, unless plaintiff would take an oath that the defendant's signature to a certain paper was a forgery, the case was remanded to the principal sudder ameen, with instructions to enquire into the merits of the case, and examine the defendant, if necessary.

enter into the subject of possession, and that as plaintiff, when called, did not appear to declare on oath that the signature on the kyfeut was not that of the cazee, so as to bring him up for forgery, he cannot enter into *that* plea. He, consequently, affirmed the order of the lower court.

"Plaintiff now appeals specially, urging, *1st*, that Section X. Regulation VIII. of 1831 has nothing to do with the case, which is one brought for arrears of rent in the civil court; *2nd*, that even if the papers were untrustworthy, the principal sudder ameen should have fully investigated regarding the possession of the cazee, and his use and occupation of the lands during the period covered by the demand in the case; and, *3rd*, that as plaintiff petitioned below that the case should be postponed for the attendance of the cazee, the principal sudder ameen ought, under Section XXX. Act XIX. of 1853, to have postponed the case for his attendance, and not made that attendance dependent on plaintiff's swearing to the signature of the cazee being a forgery.

"We admit the special appeal to try the above points."

JUDGMENT.

The decision of the principal sudder ameen is clearly defective. The case is remanded with instructions to the principal sudder ameen, to enquire into the defendants' possession, to examine the cazee if necessary as to the genuineness of his signature, and to decide clearly and distinctly whether the plaintiff is or is not entitled to the arrears of rent which he claims.

THE 6TH APRIL 1859.

H. T. RAIKES and A. SCONCE, ESQs., Judges, and H. V. BAYLEY, ESQ.,
Officiating Judge.

Special Appeals from the decision of Moulvee Ameerodeen Mahomed Khan, Officiating Principal Sudder Ameen of Chittagong, dated 2nd November 1854, affirming a decree of Mr. R. Finney, Moonsiff of Bhutteearce, dated 19th December 1853.

Case No. 565 of 1858.

Joogulkishore Chowdree, (Defendant,) *Appellant*,
versus
Mohubut Alee, (Plaintiff,) *Respondent*.

Baboos Kishenkishore Ghose and Kishensukha Mookerjee, for Appellant.
Moulvees Murhumut Hossein and Ahmed Alee, for Respondent.

Case No. 566 of 1858.

Joogulkishore Chowdree, (Plaintiff,) *Appellant*,
versus
Mohubut Alee and the Collector and others, (Defendants,) *Respondents*.

Baboos Kishenkishore Ghose and Kishensukha Mookerjee, for Appellants.
Moulvees Murhumut Hossein and Ahmed Alee, for Mohubut Alee, Respondent,
Baboo Ramapersad Roy, for the Collector, Respondent.

THESE cases were rejected by Messrs. C. B. Trevor and D. I. Money, on the 5th January 1857, for the following reasons :—

“Special appellant urges, that the decision of the lower court, declaring that the land in dispute belongs to plaintiffs’ turuf estate, is contrary to evidence—the land clearly belongs to his noabad talook.

“We observe that the question at issue is entirely one of fact, and as such has been disposed of by the lower court. We reject the application.”

A review of judgment was passed by Messrs. C. B. Trevor and D. I. Money, on the 14th April 1857, on the following grounds.

tion for the land claimed more than twelve years after his purchase; but as the land in question is noabad, the property of Government, and as Government had assigned over its right to plaintiff, this action, brought within twelve years from the assignment, is held to be within time.

The second suit was nonsuited by the lower appellate court upon the ground of multifariousness, as being brought to correct the entries in measurement records and for settlement; but, in reversal of the order below, the case is remanded for trial on its merits.

Two suits were brought before the Court in these appeals, in one of which special appellant was defendant, and in the other plaintiff. In the first case the plea of limitation is raised; and it is admitted that plaintiff, a sale purchaser, brought his action

" A review of the order passed on this application has this day been applied for by Baboo Kishenkishore Ghose, on the ground that the record had been sent for, and the respondent summoned ; and that, nevertheless, the particular point for which the record had been required was not noticed in the certificate. It appearing to the Court necessary to the ends of justice that the review should be admitted, it has, consequently, been admitted, and the Court has proceeded to enquire into the special appeals preferred in cases 67 and 76, by Joogulkishore Chowdree, in the one as defendant, in the other as plaintiff.

" It appears that Mohubut Alee sued, on the 18th February 1851, Joogulkishore Chowdree for possession of 10-3 of land as belonging to his purchased mehal, of which he had never been able to obtain possession. He states that his purchase took place on the 18th February 1839, and that from that date to the date of his institution of his suit more than twelve years have elapsed ; nevertheless, as he had before the court cases which were struck off on default, he is entitled to such a deduction of time as will bring his suit within eleven years and four months from the date of the cause of action. It appears, moreover, that on the part of Government a measurement took place of the land now sued for by Mohubut Alee, and a terij was prepared in 1846 ; and that, in consequence of these proceedings, Joogulkishore Roy, the defendant in Mohubut Alee's case, instituted, on the 4th January 1853, a suit for a declaration of his right to 8-17 of the same land as that sued for by Mohubut Alee.

" The two cases were taken up together by the moonsiff, and he decided that Mohubut Alee's case was brought within time, and on the merits gave him a decree ; he at the same time dismissed the case of Joogulkishore Roy.

" On appeal the principal sudder ameen took up the two cases together, and declared that the cause of action arose to Mohubut Alee from the date of the preparation of the terij, and that, consequently, he was within time ; and on the merits he upheld the decision of the moonsiff in both cases.

" Joogulkishore Roy, the defendant in Mohubut Alee's case, and the plaintiff in his own case, has now appealed specially from the decisions passed in both cases. He urges :

1st. That the cause of action to Mohubut Alee, according to his plaint, arose on the date of the confirmation of sale of the purchased talook, viz. the 10th May 1839, and that from that date to the date of the institution of his suit more than twelve years have elapsed, and that he is not, under Section II. of Act XXIX. of 1841, entitled to any deduction for the time during which suits, struck off on default, were before the court ; that, consequently, his suit should be dismissed.

2nd. That as Mohubut Alee's suit should be dismissed, he, as a matter of course, should obtain a decree in his suit for a declaration of his right to certain land in his possession.

"We think the principal sudder ameen should have decided these cases separately, and not have confused them as he has done. We think also that the 10th May 1839, the date of the confirmation of the purchase of plaintiff's talook by him, is the date on which his cause of action arose. We therefore remit both these cases to the principal sudder ameen, with instructions that he will take up the case of Mohubut Alee (plaintiff) and special appellant, (defendant,) and determine whether the plaintiff is within time under the statute of limitations, looking to the above date and the date of the institution of the suit, keeping also in mind the provisions of Section II. Act XXIX. of 1841; and that he will pass whatever order may seem to him necessary on that point, and any other which may subsequently arise in the case. He will then take up the case in which Joogulkishore Roy, special appellant, is plaintiff, and proceed to pass the judgment which it may seem to him to require."

These cases were again heard and admitted to special appeal on the 9th September 1858, under the following certificate recorded by Messrs. C. B. Trevor and H. V. Bayley.

"The particulars of these cases are fully detailed in the annexed special appeal certificate of the 5th January 1857, No. 67 of 1855, and in the review decision (on the same paper), dated the 14th April 1857. It is therefore needless to repeat them here.

"Case No. 565.—In this case the Court expressed the opinion that the cause of action to plaintiff was not to be taken from the date of the 'terij' of 1847, but from that of the confirmation of the sale of the 10th May 1839. The same principal sudder ameen has, notwithstanding, again taken the cause of action to be the measurement in 1847, and held that thus the plaintiff's suit, which was instituted on the 18th of February 1851, is in time. He has also held that, as the plaintiff in his plaint and replication used the words 'forcibly (*gusub*),' the special law of limitation, Regulation II. of 1805, would apply if the ordinary law of limitation did bar the suit.

"The defendant appeals specially, urging :

1st, that the date of the cause of action has been ruled by the Court to be the 10th May 1839, and the principal sudder ameen could not reiterate his wrong decision that it should be the measurement of 1847.

2nd, that Regulation II. of 1805 was not pleaded, and the mere mention of the word "*gusub*" did not justify the principal sudder ameen's supporting his present decision by a reference to Regulation II. of 1805.

" We admit the special appeal, to try whether the decision of the principal sudder ameen, on both points, is not erroneous and opposed to the plain directions he had received from this Court. In other words, whether plaintiff is not out of Court under the statute of limitations.

" Case No. 566.—In this case the same principal sudder ameen has held the suit of petitioner, there plaintiff, suing to set aside the measurement of 1847, which recorded his lands as belonging to talooks to which they did not belong, to be multifarious, because the petitioner sued for settlement, *as well as* to set aside the measurement paper. It is admitted that the objection was not taken in either court, before the principal sudder ameen himself raised it and adjudicated the point against petitioner by an order of nonsuit.

" The petitioner urges, in special appeal, that, as the objection was not pleaded, it was not competent, under Act IX. of 1854, for the principal sudder ameen to pass the order he did.

" We admit the special appeal, to try whether the principal sudder ameen's order is not erroneous."

JUDGMENT.

The suit in which Mohubut Alee is plaintiff is brought before us only for the purpose of considering the grounds, on which the principal sudder ameen disposed of the issue taken before him under the law of limitation. The plaintiff, Mohubut Alee, purchased his talooks in the beginning of 1839, and it is not denied that twelve years have elapsed from the date of the confirmation of the purchase to the date of suit : but the principal sudder ameen has held the ostensible bar to be overcome, by reason of certain proceedings taken by Government in 1847, in re-adjusting the settlement of noabad land in the Chittagong district. The land in dispute had been measured and recorded as noabad land, that is, the proprietary right of Government ; and in 1847 the revenue authorities assigned its right in the land as noabad zemindar, to make up both the deficit of the old settlement land of the plaintiff's talook, and to complete the surplus or towfeer land, which he should possess over and above that old settlement. The principal sudder ameen has accordingly held, that the plaintiff was competent to take advantage of the assignment made in his favor by Government in 1847, and that, looking at that assignment as his cause of action, his suit was in time. Upon these facts the point raised at the admission of this appeal does not arise. Special appellant himself admitted that Government dealt with the land as noabad land, and he had indeed instituted a separate suit, that the land in question should be settled with himself as noabad. Thus, as Government was perfectly competent to deal with its own

noabad estate, we think that the principal sudder ameen has not erred in looking upon the date of the transfer made in 1847 as supporting the plaintiff's title to be heard.

Holding, therefore, that the plaintiff's suit is brought within twelve years of his cause of action, it becomes superfluous to consider whether, if it had been otherwise, plaintiff was entitled to benefit by the sixty years' rule; but we may remark that we are not satisfied with the reasons assigned by the principal sudder ameen on that point.

We accordingly dismiss, with costs, the special appeal as regards the decision made in the suit of Mohubut Alee; but as regards special appellant's own suit, [we think the order of nonsuit cannot stand. The principal sudder ameen holds the claim to be multifarious, because the prayer of plaintiff involves both the correction of certain measurement papers and the settlement of some noabad land; but there seems to us to be no reason why the suit should not proceed to the determination of the substantive issue raised upon the merits of the case. It was suggested to us by the pleader for special appellant, that his client had claimed 17 gundahs 8 cowrees as his turuf land as against both Mohubut Alee and Government; and if that be so, the right asserted should be adjudicated. This second case we accordingly remand.

THE 6TH APRIL 1859.

H. T. RAIKES and A. SCONCE, Esqs., Judges; and H. V. BAYLEY, Esq.,
Officiating Judge.

Cases Nos. 118 and 119 of 1857.

Special Appeals from the decision of Mr. J. Ward, Officiating Judge of Cuttack, dated 16th April 1856, affirming a decree of Roy Gopeenath Dass, Sudder Ameen of that district, dated 17th December 1855.

Bulbhudder Misser, (Respondent,) *Petitioner;*
versus

Rajkishore Dutt, (Appellant,) *Opposite Party.*

Mr. R. T. Allan and Baboo Unnodapersad Banerjee, for
Petitioner.

Baboo Sreenath Dass, for the Opposite Party.

AN application for review of judgment in these cases was admitted on the 1st October 1858, under the following order recorded by Messrs. J. H. Patton and A. Sconce.

"It appears that this case and petition No. 2, in which the same party was special appellant, were decided on the 26th

These suits were brought by special appellant for arrears of rent, and two points are raised in special appeal.

First, that as the first court, upon the arrear awarded, made no deduction by way of percentage as surburakaree allowance, and defendant did not appeal, it was not competent to the lower appellate court, upon the appeal of plaintiff, to award that deduction.

November last, on the supposition that the decision in these two cases was to follow, as of course, the order made in a third case decided on that date. It is brought to our notice, however, that while the third case was preferred for possession, the two other appeals referred to claims of rent due previous to the date of that other suit. We accordingly re-admit the two special appeals now before us, with the view to the determination of the points raised in each case."

JUDGMENT.

These two special appeals were originally admitted on the understanding that the decision of them would follow the decision in another case, involving a claim to khas possession of the village, for the rents of which these suits were instituted.

And second, that the lower courts, which rejected plaintiff's claim for two years' rent, erred in not requiring defendant to prove the payment which he pleaded.

After the determination of the possession case, it was ascertained that the judgment could not be so applied to the facts of these cases as to settle the controversies between the parties to these suits, and, consequently, the order on the applications of special appeal has been revised, and these appeals admitted for decision on the points specially involved in them.

Held that, upon the second point, the lower courts have miscarried, and as plaintiff's claim must go back for re-consideration and adjustment as to the exact amount due by defendant, no definite opinion of this Court upon the first point is now called for.

These now are, that the right of Bulbhudder to retain possession of Nulteejarah having been recognised by this Court's decision in accordance with the judgment of the courts below, is the purchaser entitled to the rents claimed by him for the years in dispute?

It appears that the purchaser brought two actions against Bulbhudder, one for the second kist of 1257, and the entire rents of 1258, 1259, and the first kist of 1260, and another suit for the last kist of 1260, and the entire kist of 1261.

The annual rent claimed was at the rate of rs. 258 per annum, and the defendant Bulbhudder claimed to pay the amount only as agreed upon in the surburakar's papers prepared by the collector, which apportioned to him certain deductions from the gross rental as surburakaree allowances, leaving a net rental to be paid by him of rs. 219 per annum. This amount, he alleged, he had paid to the plaintiff for 1257 and 1258; and the first lower court, considering that certain jumma-wasil-baque papers, filed by the plaintiff, did not prove any amount or what was due from Bulbhudder, dismissed plaintiff's claim for those years *in toto*, and decreed plaintiff the full rent claimed for 1259 and the first kist of 1260, and on the same grounds gave plaintiff a decree for the entire rents as claimed for 1260 and 1261 in the second case. Both of these cases were appealed to the judge by the plaintiff. In the first case he claimed to have the rents of 1257 and 1258 excluded by the lower court, and, in the second case, some interest, which the first court had refused him.

The judge in the first appeal agreed with the lower court in rejecting such portion of the claim as related to the years 1257 and

1258, and, while concurring with the court below in giving to plaintiff the rents of 1259 and the first kist of 1260, declared them subject to a deduction of 15 per cent. as surburakaree allowance to Bulbhudder, and in this case and the second appeal case reduced the first court's decree in this proportion.

The special appeal points now raised before us have been that, as plaintiff alone appealed, the judge was not competent to reduce the amount decreed by the first court in plaintiff's favor, against which award the defendant had raised no objections. This plea applies to both the cases in which this deduction of 15 per cent. has been made; and in the first case the plaintiff, petitioner, also pleads that, as Bulbhudder admitted his liability to pay a certain rent, and pleaded his right to certain fixed deductions and that the balance had been paid by him, the onus of proving these two pleas rested on him, and that the lower courts were wrong in expecting to find proof of non-payment of rent in the evidence adduced by the plaintiff.

In reply to the first point above mooted, respondent's pleader referred to Construction 868, which allows the legality of an appellate court's interference with a decree in appeal in favor of the respondent, although he may not have appealed directly on the point himself. But we remark that this ruling provides that the interference of the appellate court be limited to matters involved in the appeal, that is, as we understand, matters which the appellant brings before the court in appeal, and to which the respondent is entitled to reply, and not to matters which, affecting the respondent alone, the appellant's appeal does not invite the court to interfere with.

In the present case the matter brought before the lower appellate court was the amount of rent claimed by the appellant for 1257 and 1258, and, doubtless, this involved the question of any deductions the respondent might be entitled to for those years; but as the court did not interfere with the first court's order rejecting that part of the claim, it may be doubtful whether the judge was competent to take up the question of deductions as applicable to the other years, regarding which no appeal had been preferred to him; but as the judge and the principal sudder ameen were clearly wrong in looking at the plaintiff's evidence for proof of the non-payment of rents for 1257 and 1258, payment of which the defendant pleaded, instead of requiring the defendant to prove this fact, and as the cases must be returned to the first court that the onus of proof may be properly adjusted, we think the question of deductions pleaded by the defendant should also be taken up and considered. The omission to do so in the first court was an oversight, and substantial justice requires that these cases should be reconsidered *de novo* on these points. We, therefore, remand the two cases to the first court,

that the onus of proof regarding payment alleged by the defendant may be enquired into, and also the court's opinion be given as to whether defendant is entitled to deductions for the years 1257 and 1258, as well as for those years for which the judge has allowed them.

THE 7TH APRIL 1859.

H.T. RAIKES and A. SCONCE, Esqs., Judges, and H.V. BAYLEY, Esq.,
Officiating Judge.

Case No. 660 of 1856.

*Regular Appeal from the decision of Mr. G. Loch, Judge of
Purneah, dated 21st August 1856.*

Beebee Sree Luchmeejee, (Defendant,) *Appellant,*
versus

D. S. Cohen and others, (Plaintiffs,) *Respondents.*

*Baboos Kishensukha Mookerjee and Hurkalee Ghose, for Appel-
lant.*

Moonshee Ameer Alee and Mr. R. T. Allan, for Respondents.

Suit laid at Rupees 7008.

Copies of let-
ters and regis-
tered receipts of
letters sent from
the one party
to the other,
were put in as
evidence of a
notice to defend-
ant to attend
and make deli-
very of indigo
according to an
agreement.

Held, that al-
though the
plaintiff should
more fully have
proved the let-
ters by the
testimony of
the writer or
others cognizant
of them, still,
with reference
to the trans-
mission of let-
ters on the dates

D. S. COHEN sued one Keeruth Singh and his wife Luchmeejee to recover rs. 7020, the value of indigo, with interest.

Cohen alleged that Luchmeejee and Keeruth Singh her husband had received rs. 3500 at three different times, under an agreement covenanting that Cohen was to receive, in all December 1853, the whole of the indigo made in that year by Keeruth Singh, at rs. 110 per maund. The advances were to be deducted from the total sum so payable by Cohen; and the balance of the advances then out-standing to be paid in money. If defendants failed to deliver all the indigo made in 1853 to Cohen, they were to pay Cohen rs. 140 per maund for the balance not delivered.

The appellant admits the agreement and the amount of advances. The whole contention between the parties turns upon two pleas, one of which is, that Cohen was bound by the agreement to attend and to see the indigo weighed, and to take delivery, and that appel-lant frequently required respondent so to do, but respondent did not and would not; and the other plea is, that the whole produce in 1853, of appellant's manufacture, was 40 maunds, and not, as alleged by respondent, 100 maunds.

Held, that although the plaintiff should more fully have proved the letters by the testimony of the writer or others cognizant of them, still, with reference to the transmission of letters on the dates in the receipts, to the defendant's not showing what other letters came under those receipts, and to the testimony of plaintiff's witnesses generally, the proof of plaintiff's having performed his part of the contract and having called upon defendant to deliver the indigo, was sufficient.

Held also, that the evidence of plaintiff's witnesses in connection with the statements of defendant, as to the quantity of indigo manufactured in 1853, was such as to require no interference on the part of this Court with the judge's decision as to this point.

On the first point appellant puts in a letter, dated 23rd Phalgun 1260, in which Keeruth Singh stated to R. S. Cohen, agent for D. S. Cohen, that he, Keeruth Singh, had been ready in November to deliver the indigo, but that Cohen had then declared it was kham, or not in its marketable order; and that he, Keeruth Singh, had been at Maldah, and had been a long time ill. She also cites some witnesses to prove that appellant had called upon respondent to take the indigo; that respondent did not do so; that only fifteen or eighteen boxes were sent, and, although more were promised to be sent, no more were sent.

On the second point appellant calls witnesses to prove that the manufacture of 1853 gave an out-turn of only 40 maunds.

Respondent puts in authenticated registered receipts, showing that he had written letters to Keeruth Singh and Luchmeejee, which had been received by them, two of the 23rd December and 4th January, to Keeruth Singh, and one of the 12th January, both to him and Luchmeejee, and the copies of those letters; he also puts in a letter of the 14th February of Ezekiel Cohen to Keeruth Singh, referring to registered letters having been sent to him by D. S. Cohen, calling on Keeruth Singh to deliver the indigo, and repeating the demand. Ezekiel Cohen deposes to a letter of the 14th February having been written and sent by him. Respondent also calls witnesses to prove that fifteen boxes, capable of holding $3\frac{3}{4}$ or 4 maunds each, were sent to Keeruth Singh by Cohen; and that it was stated that more boxes were under preparation.

It is objected by appellant that the writer of these alleged letters of 23rd December, 4th and 12th January, is not examined to prove them; that unproved copies are insufficient; then no letter-book is adduced; and that it is for respondent to prove that those letters, of which he puts in copies, were the identical letters referred to in Keeruth Singh's registered receipts. The receipts themselves are not denied.

We are opinion that it would have been better for plaintiff to have more fully proved the letters, and their exact purport, by the testimony of the writer, or other parties cognizant of their contents. But in this case respondent has proved that he sent letters on the dates specified under registered receipts to Keeruth Singh, and that the latter received the letters referred to in those receipts; and appellant does not attempt to show what letters, other than those of which respondent has filed alleged copies, were received by appellant from respondent under those receipts. It is shown, by the testimony of the witnesses and the tenor of the admitted agreement, that Cohen had at the time the strongest motives for writing such letters. The respondent's witnesses depose clearly to respondent's having made demands on appellant to come and weigh the indigo; and that appellant did not do so. We therefore think

the evidence on the record fairly justifies the presumption that such demands, as are purported to have been made by those letters, were made ; that appellant did not adhere to his contract to weigh and deliver the indigo ; and that respondent took all proper steps to give notice to, and demand of appellant that he should fulfil his part of the engagement.

On the other hand oral testimony alone is adduced by appellant to show that D. S. Cohen and others went to Keeruth Singh's store and saw the amount of indigo, and would not take delivery ; but even that evidence shows that this was not in all December, as required by the agreement, but some two months later, when only a small portion of indigo remained, which was rejected as bad. On the whole we are clearly of opinion that the judge's finding that respondent fulfilled the terms of the agreement is correct.

It has been attempted to be argued that appellant, Luchmeejee, had no concern with the transaction, and is not bound by Keeruth Singh's acts ; but we think the whole evidence on the record shows that Keeruth Singh acted as agent for his wife, the appellant Luchmeejee, and that appellant is properly liable.

On the point of the amount manufactured in 1853, it is contended that the judge, discrediting the evidence of both parties on this matter, should not have struck an average between the 100 maunds said to be the amount by respondent, and the 40 maunds said to be the amount by appellant, nor have taken a mortgage deed of 1851 of Luchmeejee, showing about 73 maunds to be the produce in 1851, as a basis for giving decree for 74 maunds ; but that he should have required distinct proof as to the actual amount made in 1853. We have heard and considered the evidence as to the amount of indigo produced in 1853, and allowing a margin for the amount deposed to by respondent's witnesses, which was 100 maunds more or less, the statement of Keeruth Singh, that he was likely to have a good year, and the fact that 60 or 70 maunds have been made early in the season, we think the decree for 74 maunds does not require alteration.

We dismiss the appeal, with costs.

THE 7TH APRIL 1859.

H.T. RAIKES and A. SCONCE, Esqs., Judges, and H.V. BAYLEY, Esq.,
Officiating Judge.

Case No. 659 of 1856.

*Regular Appeal from the decision of Mr. G. Loch, Judge of
Purneah, dated 21st August 1856.*

Beebee Sree Luchmeejee, (Defendant,) Appellant,
versus

Mr. D. S. Cohen and others, (Plaintiffs,) Respondents.

Baboos Kishensukha Mookerjee and Hurkalee Ghose, for Appellant.
Moonshee Ameer Alee and Mr. R. T. Allan, for Respondents.

Suit laid at Rupees 1575-2-7.

THIS suit was brought by appellant two months after the preceding suit by Cohen against her for 1575-2-7, balance of money due to her from Cohen, owing to Cohen's not having taken delivery as agreed.

We do not think it necessary to go into this case with reference to our judgment in the foregoing one, and we dismiss the appeal, with costs on appellant.

THE 7TH APRIL 1859.

H. T. RAIKES and A. SCONCE, Esqs., Judges, and G. LOCH, Esq.,
Officiating Judge.

Case No. 467 of 1858.

*Special Appeal from the decision of Mr. F. B. Kemp, Judge of
Backergunge, dated 25th December 1857, affirming a decree of
Pundit Sreenath Bidyabagish, Principal Sudder Ameen of
that district, dated 13th January 1857.*

Sreenath Roy, (Plaintiff,) Appellant,
versus

Ruttunmalla Chowdhraïn and others, (Defendants,) Respondents.

Mr. J. W. B. Money and Baboo Ramapersad Roy, for Appellant.
The Advocate General, for Ruttunmalla Chowdhraïn.

Baboo Dwarkanath Mitter, for Rajbullub Roy.

Baboos Shumbhoonath Pundit, Kishenkishore Ghose, and Unookoolchunder Mookerjee, and Mr. R. T. Allan, for the other Respondents.

THIS case was admitted to special appeal on the 28th July 1858, under the following certificate recorded by Messrs. C. B. Trevor and H. V. Bayley.

"Gourkishore Chowdhree was the husband of one of the defendants, Unoopoorna, and father of the plaintiff. Unoopoorna is found by the

The subject matter of this suit is the validity of a talook-daree pottah granted by the mother of plain-

tiff, a Hindoo widow, before she had adopted plaintiff. Both the lower courts affirmed the pottah and dismissed the suit; and a special appeal having been admitted on two grounds, it is held, with reference to the first, that the zillah judge had not relieved defendant, the lessee, from submitting proof of the circumstances of necessity that have been held to justify the grant of the talook by the plaintiff's mother; and, with respect to the second, that the danger of losing the whole estate by a sale for arrears of revenue, and the limited and encumbered resources of the widow, which together were held to justify the widow in seeking relief by the creation of the defendants' talook, furnish grounds of legal necessity within the contemplation of the law.

lower courts to have adopted plaintiff; indeed, it is stated in the judgment of the judge that this was not disputed in the appeal before him.

"Plaintiff alleges that Unoopoorna, his adoptive mother, granted to the defendant Ruttunmalla a meeras talookdaree pottah, dated 13th of Assar 1238 B. S., but that he now sued to set it aside as invalid under the Hindoo law.

"The principal sudder ameen and the judge have held that the transfer was valid under the Hindoo law. The principal sudder ameen was of opinion that it had been established that the father of the plaintiff died in involved circumstances; that the alienation of a small portion of the estates of her husband by a Hindoo widow, to enable her to save from sale for arrears of the Government revenue a more valuable portion, was legal under the Hindoo law and the practice of our courts; that fraud was neither imputed nor proved; that the alienation was a *bond fide* transaction for the benefit of the plaintiff; and that the consideration money had been appropriated to the purpose of paying the Government revenue, which was in arrears.

"The judge records his opinion thus: 'Whether the alienation by the mother was for any of those purposes authorised by the Hindoo law, whether the consideration received was appropriated to the purpose of paying the revenue due to Government, and whether such a transaction was *bond fide* and for the benefit of the plaintiff, are points which have received due consideration from the court.' The judge proceeds: 'It has been ruled by the Sudder Dewanny Adawlut that, for the payment of Government revenue, the widow of a Hindoo is authorised to alienate a portion of her husband's estate.' He then cites the case of Goorooopersaud Jana *versus* Muddunmohun Soor, dated the 11th December 1856, and Hurrischunder *versus* Nundlall Dutt, the 21st July 1856, and states: 'I have above remarked that the purpose for which the alienation took place is one that is recognised as legitimate by Hindoo law. * * * If the necessity can be proved or safely inferred by presumption, then the alienation must be considered a valid one and for the benefit of the plaintiff. The benefit of the plaintiff as creating the necessity is the test by which the legality of the transaction must be tried.'

"Then, as to the fact of the *necessity*, the judge says: 'The necessity of saving a considerable estate from the hammer justified the alienation of a smaller and less valuable one, and must be considered as an act highly beneficial to the interests of the plaintiff.' And again: 'I also find that these jumma-wasil-baquees do not by any means establish that the profits of the estate of the father of appellant were so large as is asserted by the appellant. I also find, from documentary evidence filed by the respondents, that the father of

appellant was indebted ; and, further, that, within a few months of his attaining his majority, the appellant himself had recourse to a loan for a considerable sum.' The judge further seems to rely on the fact that, when the estate was under a surburakar, there was not any large margin of profits.

"The pleader of plaintiff, special appellant, (Mr. Money,) urges :

I. That the burden of proof has been improperly thrown upon plaintiff.

II. That the necessity of alienation must be precisely found, as arising from want of funds for the widow to maintain herself, or, if she be a guardian, the infant.

III. That both such necessity and the consent of all the co-heirs must be shown, to justify the alienation.

"On the *first* point we observe that the burden of proof has been thrown on the plaintiff, when it should not have been so. The judge states : 'The pleaders of the plaintiff have not been able to satisfy me that, at the period of the transaction, or in 1238, the profits of the estate were so large, and the estate so unencumbered by debt, as utterly to preclude any necessity for the mother of the plaintiff to resort to the alienation of any portion, however small, of her husband's estate, for the alleged purpose of paying the Government revenue.' And the judge then proceeds to consider the jumma-wasil-baquee papers filed by the plaintiff. But the judge does not call upon the defendant for the required proof of the necessity. It has been laid down by the Privy Council, (in the case of Hunoomanpersad Pandey *versus* Mussumaut Babooe Muraj Koonweree, volume VI. page 419, 4th July 1856,) that, where a party necessarily knows a title to be limited and qualified, he may be reasonably expected to allege and prove facts presumably better known to him than to the infant heir, namely, 'those facts which embody the representations made to him of the alleged needs of the estate, and the motives influencing his immediate loan. But in that case it was a mortgagee dealing with the widow as guardian of an infant. It was also held by this Court, on the 11th December 1856, page 980, in the case of Gooropersad Jana *versus* Muddunmohun Soor, (a case cited by the judge himself,) that where a Hindoo widow, having a minor son living, sells or mortgages from necessity any portion of the real estate of her infant son, which she holds in trust for him, the burden of proof of such necessity, if it be called in question by the minor after reaching his majority, as in all cases in which special pleas are pleaded, lies on the mortgagee or purchaser. Thus both these cases refer to Hindoo widows acting as guardians of infants. But in page 595 of the Decisions of 1856, (21st July 1856,) is a case similar to that now before us, namely, of a childless Hindoo widow ; and there also (*vide* page 605) the purchasers have been required to prove the necessity of alienation.

"On the second point we are of opinion that the lower courts have not shown the necessity of the alienation in that precise way necessary to give validity to it under Hindoo law. The fact of a valuable estate being in arrears for Government revenue is not of itself proof of the necessity contemplated by the Hindoo law ; nor is a general finding, by the judge, of the indebtedness of the widow's deceased husband, or of the estate, to preserve which from sale the alienation was made, having no very large margin of profits, sufficient proof of such necessity. The necessity must be shown to be from want of funds arising from circumstances beyond the widow's control, such as drought, storm, or flood, referred to in the above case in page 595 of the Decisions of 1856, or other distinct cause of failure of resources of the estate beyond control.

"We would admit the special appeal therefore on the first and second points. On the *third* point Mr. Money refers us to Jadoomonee's case, *Bulnois' Reports of Cases tried in Her Majesty's Supreme Court*, volume II. page 131 of 1856, in which the chief justice is reported to have expressed the following opinion : ' Generally speaking, alienation of the property, either by gift, sale, or mortgage, is qualified only by necessity, and requires the consent of the husband's male relatives, or at least (see *Colebrooke's Digest*, page 465) of his nearest relations.' Mr. Money adds that he had communicated with the chief justice as to the authorities in support of the above opinion ; and that the chief justice referred him to the expressions in *Colebrooke's Digest*, volume III. pages 459 to 466. But Mr. Money was unable to show from those passages anything which clearly stated that both necessity *and* the consent of heirs were requisite. On this we, of ourselves, communicated with the chief justice, who has authorised us to say that the particular question was not in issue in Jadoomonee's case ; that his opinion above cited from *Bulnois' Reports* was too widely expressed ; and, further, that it was only a *dictum*, not a decision, and also that he thought that the proposition attributed to him could not be supported, unless for 'AND' be read 'OR.'

"Under these circumstances we reject the application in regard to this *third* point, admitting it on the *first* and *second*."

JUDGMENT.

Mr. H. T. Raikes.—The judge's finding is, that the loan to the widow benefited the heir, who succeeded her, by saving the estate, and that the lease is valid, as no other resources are shown to have been available.

Exception is taken to this finding, because, although the Hindoo law allows a Hindoo female to charge the estate of her husband with a debt contracted for the purpose of saving the estate from Government sale, yet the preservation of the estate should be shown

to be necessary for her maintenance, the benefit of the reversioner being no such necessity as the Hindoo law provides for.

Hence, it is argued, arises the distinction between the legality of a debt contracted by a Hindoo widow, when acting as heir of her husband, and in possession by her own right, and that of a Hindoo widow, when guardian for the infant and entitled to have her acts judged by the benefit they are calculated to confer on the infant heir.

We are told that, when acting in the latter capacity, the principle laid down by the Privy Council in the case of Hunoomanpersad Pandey would apply, and the lender would not be held responsible for any precedent mismanagement of the estate, provided he had himself been no party to it. All that he would have to show would be, that the estate was represented to him to be in danger, and that he lent the money in the full belief that his loan would preserve it. Whereas, when a lender deals with a Hindoo in possession as heir by her own right, he is bound to exercise the caution prescribed by the ruling of the Court in the cases of 21st July 1856 and 24th April 1858, by ascertaining that the estate had become liable for its arrears from failure of its natural resources, otherwise the debt would be a personal debt incurred by the widow, but could form no charge upon the estate itself in the hands of the heir.

Thus, it is contended that, in the present case, the judge, in requiring from the plaintiff proof to show that the estate was productive to such an extent that the loan to pay Government arrears was not necessary, has thrown the onus upon the wrong party; that the lender should have been called upon to prove that the arrears were the consequence of circumstances beyond the widow's control, as the ascertainment of such facts was a necessary preliminary on his part to ensure the validity of the lease he holds; and if such necessity for the loan did not exist, the charge on the estate cannot be binding on the heir under the Hindoo law, as ruled in the decisions referred to.

But it appears to me that, as the judge has found, on the proofs adduced by the defendant, that the widow had no other resources for her maintenance than this estate left by her husband, (he himself having died involved in debt, and the plaintiff, his adopted son, having had recourse to a heavy loan soon after reaching his majority,) he has decided on the proofs of the defendant to the effect said to be necessary by the plaintiff, appellant's pleader. The absence of all other resources would necessarily render this estate the only source of maintenance for the widow, and as such, the preservation of it, though doubtless beneficial to the heir eventually, was equally necessary at the time to the support of the widow.

As the finding of the judge leads inevitably to this conclusion, there is no real substance in the ground on which exception is

taken, namely, that the judge has looked to the benefit of the heir, instead of to the immediate wants of the widow, as justifying the sale or lease of a small portion of the property.

So far as the substantial merits of the case required, the onus of proof has, I think, been thrown upon the right party. On the other hand, as the defendant proved to the satisfaction of the judge, that this estate constituted the sole income of the widow, and the judge held that plaintiff had failed to show that the profits at the time were at all considerable, the finding is against any impeachment of waste or extravagance on her part as a cause of the sale ; and on these findings the judge has upheld the lease.

As to the decisions of 1856 and 1858, so much pressed upon our consideration by the pleader for the appellant, the first contains no finding of fact that the loans charged upon the estate were for money advanced for arrears of Government revenue ; on the contrary, the judgment distinctly holds that no such arrears were proved.

There was, therefore, no *application* of the particular doctrine adverted to, but merely the indication of an opinion on the part of the presiding judges to the following effect, that "the payment of the debts of the widow, unless those debts were incurred for the benefit of her husband, or under inevitable necessity, that is, a necessity not caused by any act of the widow herself, but by circumstances over which she had no control, is not a valid reason for sale under the Hindoo law."

The other case quoted in 1858 is also wanting in the particular facts, as, though the mortgage was held to have been made ostensibly to save the estate from sale, the circumstances under which recourse was had to this mode of raising the money were not shown ; and the principle of the doctrine, recorded in the case of 1856, was adverted to as requiring the court below to enter upon this enquiry.

But neither of these cases, even supposing the exposition of Hindoo law therein declared to be correct, determines that the onus of proving the nature of the circumstances which give rise to the alleged necessity, must invariably be thrown upon the lender ; and though freely admitting the distinction contended for by the pleader of appellant between the position and duties of a Hindoo female exercising proprietary rights as the heir of her husband, and one who acts in regard to his property as the guardian of his minor heir, I think there must still be a limit in each case to the responsibility incurred by the *bond fide* lender.

Elberling, in his *Treatise on Inheritance*, has collated all the authorities on this subject, and at page 73, Section CLXV., thus refers to them : "The widow is thus in her right as wife entitled to enjoy the property of her deceased husband, and as heir is *bound* to apply it for his spiritual benefit. Generally she cannot make gifts or sell or mortgage the property, because, after her death, the property is

to go to the next heir of her husband. When a sale or mortgage becomes necessary for any indispensable duty, religious or *secular*, or for her maintenance, it is valid, because *duties* must be performed, and she has a right to her maintenance out of the property." Now it has been admitted by the appellant's pleader, that the payment of the Government dues is an *indispensable* duty, and must therefore be one which the Hindoo law recognises as binding on the widow ; but it is argued that, if by waste or neglect the estate has fallen into arrears, no incumbrance can be created on it by the widow for the purpose of saving the remainder, and that, although the smallest portion of the Government kist remaining unpaid will inevitably subject the entire estate to sale, no one can safely advance the money on any pledge of the property, as the impending sale is the consequence of the widow's waste, and the Hindoo law forbids her repairing her error, by refusing to recognise any title she may wish to create to save any part of the estate from the effect of the sale.

Doubtless, for obvious reasons, the Hindoo law could not specifically provide for a case of Government sale ; but it is not consistent with Hindoo law that the widow should passively allow the estate of her husband to be swept away, when the sacrifice of a small portion of it would preserve the greater part, and the act of sale or mortgage would apparently come within the line of secular duty imposed upon her, and render valid any such alienation independent of the precedent mismanagement which may have caused the necessity. If then the alienation be in proportion to the Government demand, and the lender be able to show that he used due caution in ascertaining the apparent truth of the representations made to him regarding the jeopardy of the estate, there seems nothing in the spirit of the Hindoo law to prevent the recognition of his rights against the successors to the property ; and certainly public policy seems to require that such legitimate means of staying a sale should be available to the widow.

After careful consideration, then, I consider that the defendant must be held to have adduced sufficient proof to show that, when the husband died, he left nothing but his landed property in per-gunnah Chunderdeep for the maintenance of the widow, who had, consequently, no other sources of income to depend upon for her support ; that the defendant also proved, to the satisfaction of the judge, that the sale of this property for Government arrears was, at the time stated, most imminent, and was prevented by defendant's advancing part of the money, and that the lease was executed in her favor ; that nothing on the record tends to show that defendant had knowledge, or reasons for suspecting, that the pending sale was caused by waste or extravagance on the part of the widow in possession ; and that plaintiff has failed to prove to the satisfac-

tion of the court below, that the assets of the property at the time were so considerable that the risk of sale was solely attributable to previous mismanagement on the part of the widow. As to the point that the defendant was bound to show that adverse seasons, or some inevitable calamity, had exhausted the property and brought it to the hammer, as the only legal ground on which a charge of this nature on the property can be made valid under the Hindoo law, I do not find that the precedents quoted form any judicial ruling on the point; nor do they profess to give the precise authority under the Hindoo law which inculcates this peculiar doctrine. I would rather say that no such general rule should be laid down, but that, when a mortgagee seeks to enforce his lien against property in the hands of the heir under circumstances like the present, he must prove that the representations, which induced him to advance his money, disclosed such a state of facts as showed that the maintenance of the widow was dependent on the preservation of the estate, or that the performance of some duty enjoined by the Hindoo law justified the alienation.

For the above reasons I decline to interfere with the judge's decision, and would reject this special appeal, with costs.

Mr. A. Sconce.—This is a case brought by special appellant, Sreenath Roy, adopted in 1247 by Unoopoorna Chowdhraim under the authority of a deed executed by her deceased husband, Gourkishore Roy Chowdhree, to set aside an hereditary talookdaree pottah granted to the defendant, Ruttunmala Chowdhraim, on the 13th Assar 1238. The principal sudder ameen, who first tried the suit, held the pottah to be valid; and on appeal, the zillah judge has affirmed that judgment.

The conclusions of fact and of law found by the judge may be given as follows. *First*, as to the facts, the judge holds it to have been, by the defendant, the lessee, proved that the pottah was granted on the 13th Assar 1238, by Unoopoorna Chowdhraim, she being at that time in possession of the share formerly held by her deceased husband in the estate pergunnah Chunderdeep; that the sum of rs. 2750 paid by the lessee was a fair and adequate consideration; that between the lessor and lessee the transaction was done in good faith; that the purpose for which the lease was made was recited in the deed, namely, to enable Unoopoorna, the lessor and zemindar, to discharge an arrear of revenue due from her estate; that for the recovery of this arrear the estate was advertised for sale on the 16th Assar 1258; that the sum due, rs. 3083, was paid into the public treasury on the 14th Assar; and that this payment was almost wholly contributed from the consideration money received from Ruttunmala on the day previous. The judge has also held the defendant to have proved that the father of plaintiff, special appellant, died in debt; that, owing to the disputes of the co-sharers

of the estate Chunderdeep, the revenue was not punctually paid, and at the instance of the collector a surburakar was appointed to collect the rents ; that the accounts of the surburakar do not show any large margin of profits ; that the plaintiff himself, within a few months of his attaining his majority, had borrowed a considerable sum ; and, finally, that the plaintiff, either with respect to debts chargeable to the estate, or the assets of the estate, had failed to satisfy the judge that the assignment to the defendant should have been dispensed with.

Next, the points of law ruled by the judge were, that, under circumstances of necessity, a Hindoo widow might alienate portions of her husband's estate ; that in this case the necessity was determinable by the benefit of the plaintiff ; and that this benefit was secured by the payment of Government revenue from funds derived from defendant, the lessee, and by the avoidance of the sale of the parent estate.

Such being the nature of the judge's decision, the first question raised for determination in special appeal is the mode in which the judge ascribes the incidence of the burden of proof. It is assumed by the admitting judges, that the zillah judge has inverted the legal obligations of the parties by absolving defendant, the lessee, from the submission of proof of the necessity of the alienation, and casting that obligation on plaintiff. But from the statement above given, of the grounds of the judge's decision, it seems clear that, in the first instance, he looked to the defendant to show cause which should legally justify the alienation made in her favor by Unoo-poorna, the adoptive mother of plaintiff. As to the legal nature of the necessity, the judge's opinion may be right or wrong. That matter I will immediately consider. But, at any rate, it was from proof adduced by the defendant, that his conception of the circumstances taken to constitute the necessity of the alienation was drawn. It is true that the judge also remarks that the plaintiff had failed to show that the alienations might have been avoided, either with respect to the family incumbrances or the assets of the property ; but on these points the judge had to consider the counter-proofs offered by the plaintiff, and, so far as he was concerned, the pleas in question were of a special character, asserted in opposition to the main ground of necessity taken by the defendant.

The second question which we have to consider is the legal character of the necessity which, in the opinion of the judge, has been held to substantiate the validity of the defendant's lease. It is suggested by the admitting judges, that the necessity should be shown to spring from want of funds arising from circumstances beyond the widow's control, such as drought, storm, or flood, or other distinct cause of failure of resources of the estate beyond control ; and that, in this case, arrears of Government revenue, and a general find-

ing as to the indebtedness of the widow's deceased husband, or as to the profits of the estate, do not create the legal necessity contemplated by Hindoo law. Here it is not said absolutely that a narrow range of profits and the pressure of the husband's debts might not operate, in connection with an arrear of revenue, to the legal justification of the lease assigned by the widow ; but rather perhaps doubt is expressed as to the precision of the judge's finding. Now, I may repeat that the judge has declared that the public sale of the zemindaree for arrears of Government revenue was imminent, and that the sale of the estate, including the share which, on his adoption, became the property of plaintiff, was averted by the assignment by way of lease of a portion thereof to defendant. Again, as to the origin of the arrear, the judge takes a variety of causes into consideration. He refers to the disputes of the joint proprietors of the zemindaree which, in the year following the intended sale, led to the attachment of the estate ; to the comparatively limited profits of the estate ; and to the debts left by Gourkishore Roy, father of plaintiff ; and, putting all these facts together, the threatened sale, the payment of the arrear, and the difficulty which the widow had in meeting all the claims upon her, he held the necessity for the alienation to have been made out.

The zillah judge, in support of the view which he took of the legal necessity pressing upon the widow, referred to a decision pronounced in this Court in the case of Gooroopersad Jana and another, on the 11th December 1856, (page 980 of the Decisions,) wherein it was determined that a *bond fide* mortgage, entered into by a mother, in order to provide for payment of Government revenue, should be held to have been done for the benefit of her minor son and to be valid under the Hindoo law ; and, in order to meet the argument arising from that judgment, as well as from the very important decision passed in the Privy Council, in the case of Hunoomanpersad Pandey, (*Moore*, volume VI. page 393,) the counsel for special appellant in their addresses to the Court sought to distinguish between the position of the two widows, whose acts formed the subject of discussion in the cases quoted, and of Unooporna Chowdhra in the present case. In the former cases, the widows, having living sons, acted as managers of the estate which had devolved on them. In the present case, Unooporna, at the time she granted defendant's lease, had not adopted plaintiff, and held her husband's estate as his widow. Now, without assenting to the distinction attempted to be drawn, with respect to a mortgagee or lessee, according as the widow, having in both cases a limited and qualified power, acted in one capacity or the other, it is clear to me that the ground for the distinction does not in this case arise.

In the case of Hunoomanpersad Pandey, in which, as already said, the charge under discussion had been created by a mother acting on behalf of her infant son, it was remarked that the power of the manager of an infant heir, to charge an estate not his own, being by Hindoo law limited and qualified, can only be exercised in case of need or for the benefit of the estate. But where, in the particular instance, the charge is one that a prudent owner would make in order to benefit the estate, the *bond fide* lender is not affected by the precedent mismanagement of the estate. The actual pressure upon the estate, the danger to be averted, or the benefit to be conferred upon it in the particular instance, is the thing to be looked to. And it is added: "their lordships think that the lender is bound to enquire into the necessities for the loan, and to satisfy himself, as well as he can with reference to the parties with whom he is dealing, that the manager is acting in the particular instance for the benefit of the estate. But they think that if he does so enquire and act honestly, the real existence of an alleged sufficient and reasonably credited necessity is not a condition precedent to the validity of his charge." Now it has been contended for special appellant, that a lessee or mortgagee, or vendee, taking an interest in an estate from a Hindoo widow previous to the adoption of a son by her, must do something more, by way of proof, to establish the necessity of the charge or assignment, than has been held, in Hunoomanpersad's case, sufficient when the charge was created by a widow acting on behalf of a son living at the date of the charge. But, as at present advised, I am not satisfied of the distinction thus attempted to be drawn, with respect to the obligation incurred by a *bond fide* assignee, between the limited interest of a widow acting as manager and the limited interest of a widow as a widow, or, if I may say so, as the prospective mother of an adopted son. The principle to be followed is not, I apprehend, the direct enlargement of a legally limited power, but rather the recognition of the possible occurrence of a pressing difficulty, and the support due to a *bond fide* lessee or mortgagee dealing with a widow, no doubt partly for his own advantage, but also for the relief of the estate held by the widow. But be that as it may, the distinction in this case can have no weight. In this case the decision of the zillah judge is professedly based on substantial proof, given by the lessee, as to the necessity of the relief obtained from her; and whether in any case less full proof, or proof of an ostensible, not of real, necessity, should suffice, we need not consider. The issue before us, therefore, does not primarily depend upon the proper attribution of the incidence of proof, but upon the view taken by the judge of the justifying cause of the lease.

Now the decision of the judge must, I apprehend, be looked at in two senses, *first*, as to the legal nature of the cause or causes which

led to the transaction ; and, *second*, as to the evidence by which the cause or causes have been found in this case to be in operation. Upon the first point I think there can be no doubt that the particular necessity for the sale, held on this occasion to operate, falls within the conditions of the Hindoo law, that is, an encumbered widow driven by difficulties, not of her own creation, to assign a small profitable interest in an estate for the purpose of saving the whole from an immediately imminent public sale. The subject is one of very general and very serious importance. Certainly, we are not lightly to enlarge the rights or the discretion exercisable by a Hindoo widow, or lightly to extenuate the peril which a stranger incurs in dealing with one whose interest in an estate he knows to be restricted by positive incompetency. Nevertheless, exceptions are legally admissible ; and the justifying circumstances, in this case accepted, seem to me to fall within the exceptions of the law. The learned advocate general, it seems to me, put the matter in a strong light. Admit, Mr. Ritchie remarked, by way of argument, that the widow had been somewhat extravagant and had not husbanded her resources as the best prudence would have dictated ; but the public sale of the whole estate drew near ; within three days, if provision to liquidate the arrear had not been made, the entire estate would have been sold. Time did not serve for a prolonged or very complete enquiry ; and, under such circumstances, it was obviously the interest of the plaintiff that, to save the whole property, the fair lease of a small part should be created. But a possible case of this kind is not now before us. Here we have a joint case of pressing urgency and of involuntary incumbrance ; and these conditions incontestably fall, as admitted in the decision of the 21st July 1856, and in all the cases quoted to us, within the provisions of the law.

Next, as to the evidence which has satisfied the judge upon these points, his inferences are not open to question in special appeal. His statement as to the amount of the debts incurred by the husband of Unoopoorua is without details, but the weighty obligations incurred by the widow are given more at large in the judgment of the principal sudder ameen, which the judge adopts and affirms. I need not repeat the facts which Mr. Kemp held to be demonstrative of the existence of the necessity that pressed upon the widow ; and his conclusions are, I take it, binding upon this Court.

Mr. G. Lock.—A Hindoo widow, having the power to adopt, but not having adopted, sold part of the hereditary property to obtain funds to pay the Government revenue due from the estate, and thereby preserved it from public sale. She afterwards adopted the plaintiff, who now seeks to set aside the above sale on the ground that his adoptive mother, having, at the time of the sale, only a life interest in the property, had no power to alienate ; that a sale by a Hindoo widow is only valid in cases of necessity

prescribed by the Hindoo law ; that the present was not such a necessity as justified the alienation ; that, as laid down in the decisions of the Court of 1856 and 1858, alienation arising from the Government demand for revenue could only be considered necessary and justifiable when the arrear was occasioned by natural causes injurious to the estate, such as drought, inundation, &c. ; that, in the present case, there was nothing to show that the difficulties which led to the sale were not occasioned by the extravagance of the widow ; that the resources of the estate were ample ; and the plea set forth by the opposite party, that the sale was for the benefit of the reversioners, was untenable. And it was urged that a distinction should be drawn between the case of a Hindoo widow who had adopted a son, and a widow in the enjoyment of an estate as proprietor with a limited interest. For in the former case, as laid down in the decision of the Privy Council in the case of Hunoomanpersad Pandey, reported at page 419, volume VI. of *Moore's Indian Reports*, the purchase would be valid if the purchaser had acted in good faith and had sufficient proof of the existence of an immediate necessity which required a sale when he purchased ; for he would then have no occasion to inquire into the origin of that necessity, whether it arose from the mismanagement or extravagance of the widow, or from natural causes ; but in the latter case, when the widow was in possession as proprietor, the purchaser was bound to enquire into and ascertain that there was a legal necessity for the sale ; that the mere liability of the estate to sale for arrears of Government revenue, such arrears having been caused, not by natural causes, but by the misconduct of the widow, was not a necessity justifying the sale, unless it were made with the consent of the reversioners.

Great pains have been taken to impress upon our mind the difference in the *status* of a Hindoo widow who has adopted a son, and of a widow in possession as proprietor for life. The former, it is urged, can sell for the benefit of the heir, provided an immediate necessity, such as an arrear of Government revenue, exists ; and the purchaser, as laid down in the decision of the Privy Council quoted above, is not bound to enquire into the cause of necessity ; but the latter can only sell when the necessity is such as is laid down by the Hindoo law, namely, to preserve her maintenance, or to perform the prescribed religious duties ; but that a private sale of a portion, to preserve the rest of an estate from Government sale, is not such a necessity, unless the arrears have been occasioned by natural causes. The decision of the Privy Council, in the case of Hunoomanpersad Pandey, has materially altered the position of a mortgagee or vendee from a Hindoo widow. It has relieved him from much responsibility, and only requires him to have acted in good faith, and to have been satisfied of the existence of an

immediate necessity for the money at the time of his transaction with the widow. In the case quoted above, it is urged that the widow had adopted a son ; but the mortgagee's or vendee's position and responsibility do not rest upon the position of the widow, but on the fact of a necessity then existing, and on his own good faith in the transaction. The chief point, therefore, to be looked to, in all these cases, appears to be the necessity under which the sale is alleged to have been made, and the conduct of the purchaser. Necessity justifying sale cannot, I think, be restricted to the conditions prescribed by Hindoo law, which are very limited, but must be extended under the existing state of things, and under a new system of law materially affecting the rights of property, introduced subsequently to the Hindoo system. The private sale or mortgage, by a widow, of part of an estate, to save the remainder from a revenue sale for arrears to Government, is an act not contemplated by the Hindoo law ; but it is admitted that, under certain circumstances, the widow is justified in making such a sale. In the present case we find that the judge considers that a necessity which rendered the sale justifiable did exist. From the evidence before him he finds that the late proprietor died in embarrassed circumstances ; that plaintiff, when he came of age, was, owing to his embarrassed circumstances, also obliged to contract a loan, showing thereby that the resources of the estate were insufficient for the support of the family, or had been diverted into other channels, such as the payment of debts. He finds that the danger to the estate by Government sale, which was advertised to take place on a date close at hand, was imminent ; and that, owing to this private sale of a part of the property, the remainder of the estate was saved, the arrears of Government revenue having been paid up from the purchase money obtained from the vendee. There is nothing illegal in this finding ; nor has the judge, as alleged by the special appellant, thrown the burden of proof on the wrong party. I would therefore confirm the order of the lower court, and dismiss the appeal, with costs.

THE 7TH APRIL 1859.

H. T. RAIKES, Esq., Judge, and H. V. BAYLEY, Esq., Officiating Judge.

Petition No. 892 of 1858.

Application for Special Appeal from the decision of Mr. E. F. Radcliffe, Additional Judge of Chittagong, dated 24th February 1858, affirming that of Baboo Womachurn Roy, Moonsiff of Rungunnea, dated 13th December 1856, in the case of

Akbar Alee and others, *Plaintiffs*, Petitioners,
versus

Bhowaneechurn Ghose and others, *Defendants*.

Moonshee Ameer Alee and Moulvee Aftaboodeen Mahomed, for
Petitioners.

Roy Sreenath Sein, for Defendants.

It is hereby certified that the said application is granted on the following grounds.

The special appellants urge that they were not judgment debtors, and, therefore, that the judge's ruling, that their rights and interests should pass under the sale in execution, is incorrect.

On a perusal of the judge's decision, we find that the plaintiffs and judgment debtors are said to have held lands jointly ; but it is not by any means shown that the plaintiffs, special appellants, were judgment debtors *conjointly* with the other judgment debtors, and that, therefore, plaintiffs' rights and interests could be sold as if they were those of judgment debtors.

The special respondents in no way attempt to meet this objection, but plead that, the judge's finding being one of fact, no special appeal is admissible.

But where there would be, as above shown, a substantial defect and injustice if rights and interests of parties were sold under a decree, as those of judgment debtors, when they are not judgment debtors, this plea of special respondents is futile.

We remand the case, that the judge may find clearly whether special appellants are judgment debtors, whose rights and interests as such could be sold, and then decide the case accordingly.

Case remanded, that the judge might find clearly whether special appellants were judgment debtors, whose rights and interests, as such could be sold.

THE 13TH APRIL 1859.

H.T. RAIKES and A. SCONCE, Esqs., Judges, and H. V. BAYLEY, Esq.,
Officiating Judge.

No. 920 of 1857.

*Regular Appeal from the decision of Mr. H. S. Thompson,
Principal Sudder Ameen of West Burdwan, dated 7th August
1857.*

Musst. Lodhoomona Dasse, (one of the Defendants,) *Appellant,*
versus
Gunneshunder Dutt and Kistochunder Dutt, (Plaintiffs,) *Respondents.*

Baboo Ramapersad Roy, for Appellant.

Baboo Kishenkishore Ghose and Mr. R. T. Allan, for Respondents.

Suit laid at Rupees 9036-3-8.

It not being proved that the mother and heir of deceased lent her support to a will proved to be spurious, nor that she had forfeited her rights through waste, the lower court was not justified in excluding her from possession of his estate, and awarding maintenance only.

APPELLANT'S pleader informs us that this suit was brought by the plaintiffs, the nephews of Rakhal Dass, to secure possession of the estate left by Rakhal Dass, as his heirs at law on the death of his widow. The principal defendants sued were the mother and married sister of Rakhal Dass, and her husband Anuntram. They stated that Rakhal Dass, being in possession of his share of a divided estate, died in 1256, after making a will, by which he secured a maintenance for his mother and widow, and devised his property in trust to Anuntram, the husband of his married sister, with an allowance of rs. 25 per mensem, to be managed for his sister's benefit. The widow died in 1261, but the mother was still alive, and Anuntram managed the estate in accordance with the will of the deceased. The principal sudder ameen has set aside the will as spurious, and, while admitting in his judgment that the mother was entitled, under the Hindoo law, to succeed to the estate of her son as next heir on demise of his widow, has permitted the plaintiffs to take possession of the estate at once, assuming that, because the mother had supported the will set up by Anuntram and had accepted maintenance at the rate therein provided, she was excluded from claiming succession, and had, moreover, forfeited her right to possession by committing waste. These grounds, the pleader argues, are untenable, inasmuch as the will set up by Anuntram having failed, his client is entitled under the Hindoo law to succeed; and there has been no waste committed either by his client, the mother, or by Anuntram, who has held as trustee only, without the power of alienating the property entrusted to him.

JUDGMENT.

As this appeal has been argued on the part of the mother only, who has been excluded from enjoyment of the property of her

son for the reasons given by the principal sudder ameen in his judgment, we have merely to determine whether they are legally sufficient to exclude the appellant or not.

The principal sudder ameen relies on his judgment upon Construction 942, as authority for holding the appellant bound to be satisfied with the maintenance of rs. 10 per month provided by the will, and on the Sudder Court's decision of the 24th January 1854, as excluding her from possession of the estate on the ground of waste. But neither of the authorities can have any reference to the circumstances of this case.

The part of Construction 942, which we suppose the principal sudder ameen deemed applicable to this case, is contained in the following question, on which the ruling there promulgated is founded.

That question was : "can a person, who still holds, or within twelve years has held, possession of a portion of land in an ancestral undivided estate as maintenance, claim to have the estate divided, and his specific share allotted to him ? or can the circumstance of his having been content with a maintenance, and not having received a specific portion for a period exceeding twelve years, bar his claim to a separate possession of his own share whenever he thinks fit to demand it ?" The circumstances on which the question is raised are so entirely dissimilar from those we have before us, that the ruling on the point need not be gone into. Had the will been in force, and had the mother at some time sought to enforce the rights, the question as to how far she was bound by the acceptance of a maintenance during a period of years, and precluded from disputing the will, might have arisen : but the point is not one we have to consider in this light in the present case, and, as the case stands in the present record, the Construction is not applicable.

The second authority quoted by the principal sudder ameen is the decision of this Court of the 24th January 1854, which decision dispossessed a Hindoo widow from her husband's estates on proof of waste. But the Court in that judgment did not substitute an allowance to the widow for her maintenance, but, on the contrary, provided that her husband's heirs were bound to account to her for all receipts from the property, and merely placed them in possession as her trustees. The precedent, therefore, even if the facts proved waste on the part of a female holding a life interest only, does not support such a decision as the principal sudder ameen has given, namely, to vest the plaintiffs as next heirs of the late proprietor with uncontrolled power over the property, and payment to the mother of a monthly allowance of rs. 10.

But we do not see that the facts found by the principal sudder ameen support a charge of waste. His reasoning is, that the mother, by supporting in the reply the spurious will, under cover of which Anuntram has committed waste, is a party thereto, and

is subject to the penalty of one who, in her situation as tenant for life, commits waste. But even to the extent here assumed, the facts on record do not bear out the principal sudder ameen's conclusions. Independent of Anuntram's authority being of a limited nature, the sales effected by creditors are only of his rights and interests; and it is very questionable whether they could, by their own terms, convey away any portion of Rakhal Dass' estate; but, at the same time, it is impossible to presume that the mother's object, in assenting to the will, was to further any scheme of Anuntram in alienating the property. So far as the will goes, she derives no such power under it; it is therefore difficult to conceive how the mother's acceptance of it can be held to be indicative of fraudulent intent regarding transfers, the validity of which the will itself would not support.

On the whole, then, we are not satisfied that the record contains proof of any facts which justify the exclusion of the mother as heir of her son, and warrant the immediate entry of the nephews as heirs into the estate left by Rakhal Dass. The effect of the lower court's decree, therefore, must be limited to the cancelment of the spurious will, and the order for immediate possession by the plaintiffs must be reversed.

The appellant is entitled to receive her costs on this appeal from the plaintiffs.

THE 13TH APRIL 1859.

A. SCONCE, ESQ., Judge.

Application for Review of Judgment passed by Messrs. B. J. Colvin, A. Sconce, and J. S. Torrens, in cases Nos. 587 and 588 of 1857, dated 12th March 1858.

Case No. 140 of 1858.

Mrs. Barbara Sarah Jane Rainey, *Respondent*, Petitioner,
versus

Bhugwanchunder Ghose and others, *Appellants*, Opposite Party.
Messrs. J. W. B. Money and R. Norris, and Moonshree Ameer Alee, for Petitioner.

Case No. 141 of 1858.

Mrs. Barbara Sarah Jane Rainey, *Respondent*, Petitioner,
versus

Woomachurn Ghose and others, *Appellants*, Opposite Party,
Messrs. J. W. B. Money and R. Norris, for Petitioner.
Baboos Kishenkishore Ghose and Bungshsheebuddun Mitter, for the Opposite Party.

THIS is an application for a review of a decision pronounced by this Court on the 12th March 1858, (page 416 of Decisions,) by a bench of three judges, of whom I alone am at this time attached to the Court. Petitioner had obtained two summary decrees for enhanced rent due by her tenants on account of the years 1254 and 1255; and the tenants having brought the present action to set aside those summary decrees, the question brought before this Court for decision in the special appeal above adverted to, and now again raised, is the legal competency of the collector to make an order for the enhancement summarily sued out.

Review of judgment dis-allowed in absence of cause shown to disturb original decree.

The former rent payable by the tenants, plaintiffs in this action, was rs. 418-4: and on the 20th June 1845 petitioner obtained a regular decree, which declared her right to enhance, and fixed the rate chargeable upon appellants at 8 annas a beegah, but left the quantity of land upon which this rate was to be imposed, to be ascertained by a future measurement. The words of the decree were: "it is the privilege of a zemindar to measure his land and call on a ryot to attend; but in this case, should the ryots object to the measurement, they may, at any time before the 15th February 1846 (1252), apply to have the land measured in execution of this decree; but it will be necessary on their part to deposit the wages of an ameen." Thus, no doubt, it would appear to have been the intention of the decree, that the aid of the court should be given in execution of the decree of 20th June 1845, to determine the amount of the enhanced rent payable by the tenants under its terms; but neither party invoked the

aid of the court, and no further steps were taken with the cognizance of the court. It happened, however, that, in the course of 1253, a deputy collector in the course of his official duty was engaged in survey operations in the neighborhood of the village within which the lands occupied by the tenants of petitioner were situated ; and that for the purposes of the survey, which it was the duty of the deputy collector to execute, he undertook to survey also these lands, and thus ascertained the cultivated area occupied by these tenants. Thus, petitioner, assuming the cultivated land occupied by her tenants to have been definitely determined, professes to have served a notice upon them on the 23rd April 1847, to pay enhanced rent from the beginning of 1254 : and, subsequently, as the sequence of that notice, she brought the summary suits which form the subject matter of the actions now under discussion.

In our decision of the 12th March 1858 we held that the collector had no legal jurisdiction in the matter, and that the summary decrees for the enhanced rent should be set aside ; and the ground upon which the application for a review has been argued is, that substantially the survey of the deputy collector and the notice of 23rd April 1847 should be accepted as done in execution of the decree of June 1845, so as to empower the collector to enforce the payment of rent, the amount of which, this argument assumes, had been already decided in a regular action.

As to the question of rate there could be no difficulty. The decree of June 1845 upon this point was explicit. And again, it may be allowed that some, if not all of the tenants, were personally present when the deputy collector's survey was going on. But the deputy collector's proceedings were not in any sense taken as a judicial enquiry binding upon the tenants. The petitioner and her tenants were not parties before that officer ; and it was not at all his business to adjudicate upon the extent of the assessable land in the tenants' occupation. It may be that the quantity of cultivated land was rightly expressed by the deputy collector ; it may be that the notice of 23rd April 1847 was by petitioner upon the tenants actually served ; but petitioner's claim raised the rent from rs. 418 to rs. 2739 ; and as the very statement of this claim brings up the question of the tenants' liability for the larger sum, necessarily the collector would have to consider whether he should award rs. 2739 or any lesser sum between that amount and the old rent of rs. 418. We could, it seems to me, only recognise the collector's jurisdiction upon the assumption that the amount had been already adjudicated, and was no longer open to question. But such an assumption was obviously in this case impossible. The tenants certainly never expressed their acceptance of the deputy collector's survey, nor, failing their assent, were they legally bound by his acts. As the case came before the collector in the summary suit, the

amount of enhanced rent was still open to adjudication ; and thus it seems to me, under the restriction of Section X. Regulation VIII. of 1831, the summary suit could not, by the collector, be legally entertained. For these reasons I think this application must be rejected. The same order applies to the second case.

THE 13TH APRIL 1859.

H. T. RAIKES and A. SCONCE, Esqs., Judges, and H. V. BAYLEY, Esq.,
Officiating Judge.

Case No. 597 of 1858.

*Special Appeal from the decision of Mr. J. Grant, Judge of
Dinagapore, dated 9th March 1858, reversing a decree of
Baboo Madhubchunder Chowdhree, Acting Sudder Ameen of
that district, dated 28th January 1857.*

Musst. Khemamoyee Chowdhraïn and others, (one of the
Defendants,) *Appellants,*
versus

Mahomed Chowdhree, (Plaintiff,) and Anundgopal and others,
(Defendants,) *Respondents.*

*Moulvee Murhumut Hossein and Baboo Bhoobunmohun Roy, for
Appellants, Ex-parte.*

THIS case was admitted to special appeal on the 21st September 1858, under the following certificate recorded by Messrs. H. T. Raikes and J. H. Patton. Held that, where there is no mention in the plaint of a demand for a receipt, penalty damages under Section LXIII. Regulation VIII. of 1793 and the Sudder Court's judgment of 20th April 1858, page 764, Decisions, cannot be decreed. But the order decreeing plaintiff a receipt was affirmed.

"The petitioner pleads in special appeal, that the judge has decreed against her a claim for damages for refusing a rent-receipt to the plaintiff, but alleges that the plaint does not aver the refusal by petitioner to give a receipt ; only that the acknowledgment given was not to the effect desired by the plaintiff. Such a claim, therefore, cannot procure plaintiff damages according to Section LXIII. Regulation VIII. of 1793.

"We observe that the judge records in the decree that petitioner refused the receipt, but also observes that the case is in its circumstances similar to case No. 15 of 1855 between the same parties. Now, petitioner shows us that the order of the judge in No. 15 of 1855 was reversed by this Court in special appeal, because there was no proof on the record that plaintiff had demanded a receipt from petitioner, which proof was necessary to justify the imposition of the penalty prescribed by the law.

"As this case also seems to be wanting in this particular, we admit the special appeal, to try whether the finding of the judge is sufficient to warrant the decision."

JUDGMENT.

On a reference to the plaint, we find that there is no mention there of a demand for a receipt, to justify a decree for penal damages under Section LXIII. Regulation VIII. of 1793 ; and concurring in the judgment of the Court of 20th April 1858, page 764, Decisions, we reverse the decree of the judge as to penal damages, but affirm the decision of the court of first instance, decreeing to the plaintiff a receipt.

We decree this appeal with this modification. Costs will be paid by respondent in proportion to the amount decreed in this appeal.

THE 13TH APRIL 1859.

H. T. RAIKES and A. SCONCE, Esqs., Judges, and H. V. BAYLEY, Esq.,
Officiating Judge.

Case No. 953 of 1857.

Special Appeal from the decision of Mr. W. T. Trotter, Judge of Mymensing, dated 13th May 1857, affirming a decree of Mr. J. Baptist, Moonsiff of Pingnah, dated 13th November 1856.

Lokenath Surma Roy Misser Bidyalunkur, (third party in the first instance,) *Appellant*,
versus

Shusteedhur Surma, (Plaintiff,) and Huronath Surma and other, (Defendants,) and Muddunmohun Bytal and others, (third party in the second instance,) *Respondents*.

Baboo Unookoolchunder Mookerjee, for Petitioner.

Baboo Kishensukha Mookerjee, for Sreeshteedhur, (Plaintiff,) Respondents.

Plea of limitation held not to apply, as the majority of plaintiff must be reckoned from the end of his eighteenth year, he suing as zemindar in possession of one portion of an estate for recovery of another portion.

THIS case was admitted to review by Messrs. H. T. Raikes, B. J. Colvin, and J. H. Patton, on the 11th September 1858, under the following order.

“Petitioner’s (plaintiff’s) suit was dismissed as barred by the law of limitation, in reversal of the judgment of the lower courts. Review is now sought on the ground that a wrong calculation was made. The Court held that, by adding the time that the father of plaintiff had lived after Tarinee’s death, for whose property the suit was, to the number of years plaintiff had failed to sue after attaining his majority, the suit was barred ; but it is now shown that plaintiff attained majority eleven years two months eight days before the suit, to which six months and twelve days for the father’s life being added, twelve years are not exceeded.

"We shall admit this review, to try whether, by this calculation, plaintiff's suit was not in time, and also to try the other point recorded in the certificate, whether plaintiff can calculate majority at eighteen years of age."

JUDGMENT.

It is admitted by the (defendant's) special appellant's pleader in this case, that the plaintiff's suit is within time, unless the plaintiff's minority should be held to have terminated on the completion of sixteen years, and not of eighteen years. But we are clearly of opinion that the plaintiff was entitled to reckon his minority for the larger period. He sued as zemindar in possession of one portion of an estate for recovering possession of another portion: and, under these circumstances, plaintiff's majority must be reckoned from the end of his eighteenth year. We accordingly dismiss the special appeal, and affirm the judgment below, with costs.

THE 13TH APRIL 1859.

H. T. RAIKES and A. SCONCE, Esqs., Judges, and H. V. BAYLEY, Esq.,
Officiating Judge.

Case No. 137 of 1858.

Special Appeal from the decision of Mr. W. T. Trotter, Judge of Mymensing, dated 7th August 1856, affirming a decree of Baboo Kaleekinkur Roy, Sudder Ameen of that district, dated 14th March 1856.

Chundeeka Dassea, (Plaintiff,) Appellant,
versus

Goureepersad Dutt and others, (Defendants,) Respondents.

Baboo Poornochunder Roy, for Appellant.

Baboo Meherchunder Chowdree, for Goureepersad Dutt.

THIS application was originally rejected on the 1st August 1857, under the following order recorded by Messrs. H. T. Raikes and A. Sconce.

"No. 1682.—Petitioners, being purchasers of an estate sold for arrears of public revenue, have instituted this suit to recover possession of certain land which is held by defendants, but belonged, as they say, originally to their estates, and they have also instituted a separate suit to recover arrears of rent due from the same land. Both cases have been dismissed under the law of limitation, as it has been held that plaintiffs, being out of possession for more than twelve years subsequent to the date of their purchase, are barred from preferring a suit to recover the land from defendants.

Case remanded, the limitation term properly being reckoned from the date of confirmation of sale, and therefore of possession, not from the date when the rents of right belonged to plaintiff.

"The ground of special appeal is, that the lower courts should have tried first the right to possession, and then the right to rent. But we observe that both cases have been decided by the judge on one and the same day, and that, with respect to the single point upon which the suits have been dismissed, there was no legal error in taking the proofs of dispossession in one to be available in the other.

"Petition is rejected, with costs.

"No. 1684.—The same petitioners as in no 1682 prefer a second application for special appeal, with respect to the suit for rent above adverted to. In this case their plea is that the judge has erroneously calculated the time which he has taken to bar the plaintiffs' action : but as plaintiffs have been out of possession for more than twelve years, and the defendants held upon a title adverse to them, and as plaintiffs' suit to recover possession has been dismissed, they cannot be entitled to recover rent from land from the proprietorship of which they stand divested. Petition rejected."

On an application for review, the case was admitted on the 20th February 1858, under the following order.

"This application is made for a review of our order of 1st August last, by which petitioner was held to have shown no good cause for disturbing the order of the zillah court, which had dismissed petitioner's suit for the recovery of certain land under the law of limitation.

"Petitioner is a sale purchaser under Regulation XI. of 1822 : and the point which she raises is that, in reckoning the date from which her cause of action for the recovery of land alienated from her estate must be taken to date, is the confirmation of the sale, and not the day of sale.

"The sale in question appears to have been confirmed on the 28th June 1841. Plaintiff's present suit was instituted on the 5th February 1855. But, intermediately, another suit, instituted for the same purpose, had been nonsuited : and petitioner's averment is, that, deducting one year nine months and twenty-two days, during which that suit was pending, the present action, if the period of limitation be reckoned from the 28th June 1841, will be found to be within time. The zillah judge appears to have held plaintiff's action barred, because it had not been preferred within twelve years calculated as from the date of sale. But the words of Clause 4, Section XXIV. Regulation XI. of 1822 declare that no sale shall be deemed absolute, or entitle the purchaser to assume possession of the lands sold, until the confirmation of the Board of Revenue shall have been received ; and as it appears to us that the law has not been correctly applied in this case, we admit the review applied for, and at the same time admit the special appeal for the determination of the above point."

JUDGMENT.

The judge has held limitation applicable in this case, after deducting the period during which the nonsuited case was pending, because plaintiff's suit is for possession of land belonging to talook No. 33, which plaintiff purchased more than twelve years before institution of suit, and the judge refused to calculate limitation from the date of confirmation of sale, because plaintiff had, in another suit, claimed payment of rent of the land in suit from date of purchase, and not from date of confirmation of the sale by the proper revenue authorities.

But in thus applying the law the judge has overlooked that, while plaintiff could not procure possession of the talook until confirmation of the sale, her right to rent extended back to the date of the sale, though that right could not be exercised by any demand until delivery of possession, therefore, although the balance of rent due to plaintiff dates beyond twelve years, her right to demand it only accrued to her on confirmation, which dates subsequently.

Any question, therefore, of limitation arising from the exercise of plaintiff's right as proprietor, must be governed by reference to the above date; and as this date, it is admitted, when the period of the nonsuit is deducted, will bring plaintiff's case within time, she is entitled to a hearing on the merits. This case is therefore remanded for trial with reference to the above remarks.

THE 13TH APRIL 1859.

H. T. RAIKES and A. SCONCE, ESQS., Judges, and H. V. BAYLEY, ESQ.,
Officiating Judge.

Case No. 518 of 1858.

Special Appeal from the decision of Mr. E. Latour, Judge of the 24-Pergunnahs, dated 15th February 1858, reversing a decree of Baboo Obhoycoomar Dutt, Sudder Moonsiff of that district, dated 26th December 1856.

Kaleecoomar Chatterjee, (one of the Defendants,) *Appellant,*
versus

Hurrochunder Roy, (Plaintiff,) and Lallchand Banerjee and others,
(Defendants,) *Respondents.*

Baboo Bhoobunmohun Roy, for Appellant.

Baboo Chundernath Chatterjee, for (Plaintiff,) Respondent.

THIS case was admitted to special appeal on the 10th August 1858, under the following certificate recorded by Messrs. C. B. Trevor and H. V. Bayley. Case remanded; the lower court having decided the case

ex-parte, when the respondent, though he had taken the option allowed by law of filing no answer, was yet desirous at the trial to contest appellant's arguments verbally.

"Plaintiff sued for possession of land under a mouroosee pottah.

"The moonsiff found that, at the time of the grant, the grantor was only in possession of one-half the land alleged to be covered by the pottah, and decreed plaintiff's suit to that extent. The plaintiff appealed from this decision to the judge, and claimed the whole. The judge relies upon the fact that, on a local investigation, Radhamonee, one of the heirs of the original grantor of the pottah, was found to be in full possession.

"The judge gives plaintiff a decree for all his claim. He also records as follows.

'The vakeel of respondent put in issues; *but filed no answer to the declaration in appeal. The case has been decided ex-parte upon the record.* It was not known to the court at the time; otherwise the issues would have been drawn *ex-parte*. Any vakeel acting so irregularly will be fined, should such mal-practice come to the notice of the court.'

"The defendant appeals specially, urging, *first*, that the judge has decided the case upon the evidence of possession available from a local investigation, but not upon proof of *title*; *second*, that no answer to the declaration (moojihat) of appeal is required by law, and that, consequently, the judge's order, deciding the case *ex-parte* on that ground, is illegal.

"We admit the special appeal, to try whether the *ex-parte* decision of the case is not wrong; and whether the case should not be remanded for re-investigation by the judge, after hearing the evidence and arguments which may be adduced by *both* parties on the appeal."

JUDGMENT.

The zillah judge, by his own showing, has decided this appeal *ex-parte* with respect to the defendants, respondents; and as the ground for so trying the case, he takes the fact that the respondent had filed no answer to the reasons of appeal. But by Clause 2, Section IX. Regulation XXVI. of 1814, it is left to the option of a respondent to file an answer to the reasons of appeal or not, as he may think proper; and, necessarily, if a respondent think fit to exercise that option, it is not competent to the zillah judge to put him out of the court altogether, and to refuse to listen to any argument or issue which, through his pleader, he may desire to contest. In this case, the point taken by the respondent was, that the lessor, Radhamonee, had no title in the land which she leased, inasmuch as her mother had no more than a life interest in the land; but the question of right so contested the judge has not looked to. For these reasons we remand the case to the zillah judge for re-trial with reference to these remarks.

THE 13TH APRIL 1859.

H. T. RAIKES and A. SCONCE, Esqs., Judges, and H. V. BAYLEY, Esq.,
Officiating Judge.

Case No. 595 of 1858.

Special Appeal from the decision of Mr. R. Abercrombie, Judge of Dacca, dated 23rd February 1858, affirming a decree of Mr. T. C. Pennington, Sudder Ameen of that district, dated 10th July 1857.

Muddunmohun Roy, (Defendant,) *Appellant,*
versus

Raheem Buksh and others, (Plaintiffs,) *Respondents.*

Baboo Unookoolchunder Mookerjee, for Appellant.

Baboo Kishensukha Mookerjee, for Ramlukhee Dassea, Respondent.

THIS case was admitted to special appeal on the 21st September 1858, under the following certificate recorded by Messrs. C. B. Trevor and H. V. Bayley.

"Plaintiffs aver that defendant executed a kistbundee to pay the amount of a decree by instalments, and that defendant has not paid what was due under it.

Appeal rejected; kistbundee, now repudiated, having been admitted by appellant in the lower court.

"Defendant admits execution of a kistbundee, but states that with it there was the transfer in lease to plaintiffs for six years of a share in the village of Daghenpore, and that from the profits of that lease plaintiff has realised what was due from defendant. It was added that one Jankeenath held the documents.

"The court of first instance decreed plaintiffs' claim, and the appellate court upheld the decree.

"The defendant appeals specially, urging, *first*, that the judge has recorded his (defendant's) admission of the kistbundee pleaded by plaintiffs, whereas he denied it, and any such admission is opposed to his pleadings and to his grounds of appeal; *second*, that the burden of proof of plaintiffs' possession under the lease has been wrongly thrown upon him, defendant.

"On a reference to the record we find that, while the judge records that the vakeel of special appellant admitted the kistbundee, the grounds of appeal before the judge urged that defendant did *not* admit the kistbundee adduced by plaintiffs. We would therefore admit the special appeal to try whether, under the above circumstances, the vakeel's admission binds his client; and if not, whether the case should not be remanded, in order that the judge may re-try the case with reference to the genuineness of the kistbundee adduced by plaintiffs, or that of the kistbundee referred to by the special appellant in his grounds of appeal, and the lease pleaded in connection with it."

JUDGMENT.

We think there is good ground on record for believing that special appellant's vakeel admitted the kistbundee before the judge, or at least did not require the lower court to enter upon the proof of it adduced by the plaintiffs. There is a proceeding held by the judge on the 22nd February 1858, the day before the case was heard and decided by the judge, in which it is recorded that the point to be determined in appeal was, whether the plaintiffs' father had held possession of the land under the farming lease or not; and as the case was finally disposed of on that issue, the judge remarking that the vakeel admitted the kistbundee, we see no reason to doubt that such admission was made. As to the competency of the vakeel to make such an admission in the face of his client's denial of the document in his pleadings, we consider he was competent to do so, the matter being within the scope of his duty as representative of his client before the court; and any admission made in conducting his client's case by a vakeel is binding on his principal. We therefore see no reason to interfere with the judgment of the court below; and reject the appeal, with costs.

THE 13TH APRIL 1859.

H. T. RAIKES and A. SCONCE, Esqs., Judges, and H. V. BAYLEY, Esq.,
Officiating Judge.

Case No. 340 of 1858.

*Special Appeal from the decision of Mr. J. Weston, Principal
Sudder Ameen of Tirhoot, dated 22nd June 1857, amend-
ing a decree of Moulvee Iradut Alee Khan, Sudder Ameen of
that district, dated 10th July 1855.*

Methun Lal and others, (Defendants,) Appellants,
versus

Renoo Lal and Kalleechurn, (Plaintiffs,) Respondents.

*Moulvee Murhumut Hossein and Moonashee Ameer Alee, for
Appellants.*

*Baboos Shumbhoonath Pundit and Kishenkishore Ghose, for
Respondents.*

In a suit where one party asserted that a separation had taken place in family only, and the landed property continued to be held ijmalee, but the other party

THIS case was admitted to special appeal on the 21st May 1858, under the following certificate recorded by Messrs. B. J. Colvin and A. Sconce.

"This suit was instituted by plaintiffs against petitioners, defendants, to acquire a share in what they described as joint family property. According to plaintiffs, they and defendants, or their respective ancestors, Ramadhun Singh and Chuckurdharee, lived in common

for all purposes to the year 1243 ; from 1244 they broke up their common establishments and lived separately, but continued their joint possession of the property till 1250, when plaintiffs were dispossessed.

"Defendants, petitioners, on the other hand say, that their ancestors had no common interest of any kind in living or in possession of property for very many years, and that the property sued for is their exclusive property.

"The principal sudder ameen having given judgment for plaintiffs, the ground of special appellants is, that the principal sudder ameen has erroneously applied the doctrine of the burden of proof, so as to deprive petitioners of the trial of the plea raised by them, that the plaintiffs' claim was barred by limitation. The principal sudder ameen has required defendants to prove the separation of the family and division of the family property. In support of his view, the principal sudder ameen quotes the case reported at page 986 of the Decisions of 1856, in which it was held that a special plea, raised by defendants, as to separation and division made by a joint family at a given time, must be proved specially by them. But the present suit would appear to be of a different character. There is no common admission of the existence of a joint family up to a certain date, and, accordingly, the assertion of an exceptional plea appears not to arise. The ground of plaintiffs' action is dispossession in 1250 ; and it appears to us doubtful whether the principal sudder ameen has rightly relieved them from the necessity of proving possession to that date. We admit the special appeal to try that point."

averred the contrary, it was found that the lower court had not thrown the burden of proof upon the defendants, or gone on their proofs only, but had rightly weighed the proofs of both sides, and decided on the merits. Appeal dismissed.

JUDGMENT.

We are of opinion, on a perusal of the judgment of the principal sudder ameen, that the point on which the certificate admits the appeal does not directly arise in this particular case.

Plaintiffs' and defendants' fathers were uterine brothers. Plaintiffs aver a joint family household existing up to 1244, and then a separation in family *only*, but that the landed property continued to be held joint till Cheyt 1250, when plaintiffs state they were dispossessed. Defendants met this action by the plea that the family and landed property had been separate long before 1244, and denied the plaintiffs' joint possession and their dispossession.

The sudder ameen gave plaintiffs a decree only for annas 2-12½ of one village as joint property.

The principal-sudder ameen on appeal stated that, under the case of Bunwaree Lal, 11th December 1856, page 986, the defendants, having specially pleaded a division, must prove that, and then went into the proofs of both parties, and found that the preponderance of proof was in favor of plaintiffs' case, and decreed their appeal.

Defendants appealed specially ; and their appeal was admitted to try whether, as they had alleged dispossession in Cheyt 1250, the burden of proof was not on them to show their possession then.

A perusal of the principal sudder ameen's decision clearly shows that the principal sudder ameen had fully weighed, not only the proofs adduced by defendants, but the whole brought forward by plaintiffs in support of their case, and then decided the case on its general merits.

We therefore do not think a valid ground for the admission of a special appeal, under the circumstances of this particular case, exists ; and we reject the appeal, with costs.

THE 13TH APRIL 1859.

H. T. RAIKES and A. SCONCE, ESQS., Judges, and H. V. BAYLEY, Esq.,
Officiating Judge.

Case No. 89 of 1858.

Special Appeal from the decision of Mirza Mahomed Siddiq Khan, Principal Sudder Ameen of Sarun, dated 6th June 1857, affirming a decree of Syud Mahomed Wajid, Sudder Moonsiff of that district, dated 24th December 1855.

Ramessur Narain Sahee and others, (Plaintiffs,) *Appellants,*
versus

Gungapersad Roy and others, (Defendants,) *Respondents.*

Baboo Kishensukha Mookerjee, for Appellants.

Baboo Bhoobunmohun Roy, for Rampersad Narain Tewaree, Respondent.

Moulvee Murhumut Hossein, for Gungapersad Roy, Respondent.

As in the case of sales set aside as invalid, so of sales reversed, and J. S. Torrens. THIS case was admitted to special appeal on the 3rd February 1858, under the following certificate recorded by Messrs. A. Sconce

the purchaser, under Regulation VII. of 1825, is entitled to receive back his purchase money on restoring the purchased property. "The present petitioners instituted this suit to set aside the sale of their property, which had been made in execution of a decree passed against them.

"By both the lower courts the sale has been annulled, on the ground that it took place eighteen days after the date fixed, without notice of postponement. At the same time the petitioners have been directed within one month to repay to the purchaser the price paid, before taking possession of the property. The principal sudder ameen remarks that, as the purchase money had been expended in liquidation of the plaintiffs' debt, they were justly bound to make good the amount. Against this last direction petitioners come up in special appeal.

"We admit the special appeal, to try whether the order for the reimbursement of the purchaser has been in this case properly made."

JUDGMENT.

We see no just ground for interfering with the lower court's decision.

Clause 4, Section III. Regulation VII. of 1825 provides that, "whenever a public sale may be set aside as invalid under the preceding clause, or *on any account whatever*, and no collusion or fraud shall appear on the part of the purchaser, he shall be entitled to receive back his purchase money on restoring any property delivered over to him;" and we are of opinion that the same principle of law should be made applicable to cases in which sales are reversed under the provisions of the general law.

We therefore dismiss this appeal, with costs.

THE 14TH APRIL 1859.

C. B. TREVOR, Esq., Judge, and E. A. SAMUELLS and G. LOCH, Esqs.,
Officiating Judges.

Case No. 527 of 1857.

Regular Appeal from the decision of Baboo Taruknath Sein, Principal Sudder Ameen of the 24-Pergunnahs, dated 31st March 1857.

Hurro Sahoye Mul, (Defendant,) *Appellant,*
versus

Eusoof Beg, (Plaintiff,) *Respondent.*

Baboo Kishenkishore Ghose and Mr. R. T. Allan, for Appellant.
Moonshee Ameer Alee, for Respondent.

Suit laid at Rupees 15,550-2.

PLAINTIFF states, that in November 1841 he was appointed commissariat gomastah of the tope khanah at Candahar, and supplied the 38th regiment with russod to the end of 1842. When the regiment returned to Ferozepore, he and other gomastahs ceased to be employed. Plaintiff had a claim against Government for Co.'s rs. 22,616-10-8, and in January 1843 sent in his accounts, supported by the necessary vouchers. These accounts were not adjusted till 1854, during which time the commissariat office had been removed from Meerut to Calcutta. In October 1854 the accounts were passed by Government, when the defendant, who had been head gomastah with the army, intervened and claimed the money, stating that plaintiff was his servant and had fraudulently appropriated the

The order of the lower court affirmed, as it was proved that the payments made by plaintiff to defendant, were not unconditional, but subject to a future adjustment of accounts, which the defendant has failed to make.

vouchers. Colonel Thomson, to whom the complaint was made, told the parties to settle their differences in three or four days, or the money would be escheated. Fearing that he would lose everything if he held out, plaintiff proposed to the defendant to come to terms. The defendant then proposed that plaintiff should give a mook-tearnamah to one Balkishen, who would receive the amount from Government, and would divide it equally between them, and they could hereafter adjust their own accounts and make a settlement. Plaintiff acceded to these terms, though defendant was not entitled to the money, and, accordingly, Balkishen, having received the amount from the Bank of Bengal, in the presence of the plaintiff, and of several witnesses, paid defendant the sum of rs. 11,300 on the 4th November 1854. As defendant, though repeatedly requested to do so by the plaintiff, would make no adjustment of accounts, plaintiff has brought the present action to recover the money fraudulently taken and still withheld from him.

The defendant, after raising some objections as to jurisdiction, stated that plaintiff and his son, Hussun Beg, were his (defendant's) servants, and employed in the commissariat. Plaintiff was sent by the defendant to Candahar to supply the sick and wounded and the artillery at that place with rations; that plaintiff was not responsible to Government for anything, and no security had been demanded or taken from him, as he was subordinate to the defendant, who was alone responsible; that, at the close of the war, plaintiff and several other servants stole the vouchers and sent in claims to Government on their own account, for sums really due to the defendant; that he, defendant, gave information against plaintiff at the commissariat office in Meerut, and he was apprehended, but, owing to the removal of the office to Calcutta, no enquiry took place; that, subsequently, defendant claimed the money and made known the circumstances of the case to Colonel Thomson, who said that the plaintiff should not receive the money without the consent of the defendant; that plaintiff then proposed to take rs. 5,000 and to pay the balance to the defendant, who, after some demur, and in consideration of plaintiff's service, consented to this arrangement; that plaintiff, having received from the commissariat office a cheque for the amount, disappeared, and has not to this time paid any money to the defendant. He adds, further, that he never told plaintiff to draw the money through Balkishen, and that he is not acquainted with that individual.

The principal sudder ameen gave a decree for the plaintiff for the principal and interest, from date of suit, holding it to be proved that the defendant had received the sum of rs. 11,300 from plaintiff, on the understanding that it was to be refunded if, on a settlement of accounts, the sum should not be found to be due.

An appeal has been preferred from this decision, on the ground that the plaintiff has failed to prove his own case ; that if, as he asserts, the money were all his own, and he had no connection with the defendant, it is unlikely that he would consent to give up half to the defendant, who had no valid claim to it ; that if he had, from any cause, been induced to make over the money, he would surely have taken the precaution to obtain some acknowledgment from the defendant, setting forth the terms on which such payment was made ; that with the exception of the evidence of one witness, the plaintiff's story of an agreement on the part of defendant to refund the amount alleged to have been paid to him, should nothing be found due on an adjustment of accounts, was unsupported by the evidence of the other witnesses ; that if their evidence was to be believed as to the payment of the money by the plaintiff to the defendant, it was an unconditional payment, and, being such, the money could not be recovered by a suit ; that the Court should not look at the defendant's answer or the assertions contained therein, which, it is admitted, were unsupported by any evidence, but should treat the case as an *ex-parte* one, and determine, on the evidence adduced by the plaintiff, whether he had or had not made out his case.

The pleadings do not, it appears to us, disclose the connection between the parties, nor the nature of the transactions which took place between them. That they had transactions of some kind is apparent from Major Newbolt's letter to the principal sudder ameen, dated 31st March 1857, in which he describes plaintiff as gomastah of the topekhanah and defendant as gomastah of the grain godown, and adds, that there had been transfers in account between them. The evidence of the plaintiff's witness, Mirza Mahomed Alee, shows that some unadjusted accounts existed between the parties ; and had such not been the case, it is highly improbable that plaintiff would, as he alleges, have paid over half of the sum due to him by Government on the unfounded claim of the defendant, or consented to the terms said to have been proposed by the latter, that each should take half, and, on a settlement of accounts, if there was nothing due to the defendant, he should refund that half to the plaintiff. We think the evidence adduced by the plaintiff, to prove the payment of rs. 11,300 to the defendant, is deserving of credit. The evidence of Balkishen appears to be straightforward. He relates his part in the transaction, which consisted in drawing the money due to the plaintiff, and paying half to each of the parties ; and what he states is perfectly consistent with what is related by Mirza Mahomed Alee, of the negotiations which took place, but with which Balkishen does not appear to have been acquainted. Assuming it, therefore, to have been satisfactorily proved, that the money was paid to the defendant, it remains to be determined

whether the payment was made unconditionally or with a reservation. In the heading of his plaint, the plaintiff states that the money was fraudulently obtained from him by the defendant. He does not, however, show what fraud was practised, or bring any evidence to prove that he was defrauded of the money. He, however, from his own deposition, taken by the principal sudder ameen, and the evidence of his witness, Mirza Mahomed Alee, the credibility of which is not impugned by the appellant, shows that the money was paid, subject to an ultimate adjustment of accounts, and this evidence makes out a strong *prima facie* case for the plaintiff, though he has acted very unguardedly in paying the money, without having some instrument drawn up and executed by the defendant, showing the exact nature of the transaction between them and the terms on which the money was paid. The defendant has not attempted to rebut this evidence. He has not adopted the statement of the plaintiff, and pleaded that the money was paid unconditionally on settlement of accounts, but admits that there were negotiations between them, and that he entered into an arrangement with the plaintiff, differing materially from the arrangement set forth in the plaint; but he has produced no evidence in support of the allegations set forth in his answer. It is also improbable that the plaintiff, if he, with the consent of the defendant, obtained a cheque and appropriated the whole amount he claimed, should, without cause, bring the present action against the defendant for a portion of that sum. Considering it, therefore, to be proved, that the sum of rs. 11,300 was paid to the defendant, and that it was paid with a proviso of being refunded, should the same, on a settlement of accounts, not be found due to him, and that the defendant has avoided a settlement of accounts, as agreed to; and, rejecting the defendant's plea of non-jurisdiction as invalid, we confirm the order of the lower court, and dismiss the appeal, with costs.

THE 14TH APRIL 1859.

A. SCONCE and C. B. TREVOR, ESQS., Judges, and H. V. BAYLEY, ESQ.,
Officiating Judge.

Case No. 411 of 1858.

Special Appeal from the decision of Mr. H. C. Halkett, Acting Judge of Hooghly, dated 28th December 1857, reversing a decree of Baboo Kassiasur Mitter, Principal Sudder Ameen of that district, dated 18th February 1856.

Musst. Juggodumba Debea, mother and guardian of Bholanath Chatterjee, (Plaintiff,) *Appellant*,
versus

Radhamohun Dass and others, (Defendants,) *Respondents*.

Baboo Kishenkishore Ghose and Obhoychurn Bose, for Appellant.
Mr. R. T. Allan, for Radhamohun Dass, Respondent.

THIS case was admitted to special appeal on the 2nd July 1858, under the following certificate recorded by Messrs. B. J. Colvin and A. Sconce.

"Petitioner, on the allegation that she was purchaser of a portion of the rights and interests of Surbanee Dasse, sued special respondent, durputneedar, for rent, who pleaded that he paid Gourmonee, the purchaser of the property in suit from Surbanee. The judge, in reversal of the principal sudder ameen's decree in petitioner's favor, dismissed her suit, because she had not proved the property to have been that of Surbanee at the time of sale; but petitioner objects that the judge has omitted to notice what was distinctly laid before him, that Gourmonee had brought a suit to reverse the sale at which petitioner had purchased the rights and interests of Surbanee, which suit had been dismissed. We admit the special appeal, to try whether the result of the suit in question should not have been considered in this case, and also whether the judge should not, instead of dismissal, have nonsuited petitioner for suing for rent before establishing the judgment debtor's, namely, Surbanee's *bond fide* property in what had been sold as belonging to her, so that petitioner may not be debarred from bringing another suit for rent against the durputneedar and Gourmonee, if she may be so advised."

JUDGMENT.

Messrs. C. B. Trevor and H. V. Bayley.—It appears that petitioner, on the 1st July 1854, purchased the rights and interests of Surbanee Dasse in a putnee talook, in execution of a decree against

creed against the other party, in their suit for the reversal of the sale in execution, at which sale special appellant had purchased.

The purchaser of a putnee at a sale in execution of decree, sued a durputneedar for rent. The latter pleaded payment to another party as purchaser from the same putnee. The special appellant pleaded that a suit by that other party to reverse the sale in execution, and based on such alleged purchase, had been dismissed, and the judge has not considered the fact in his judgment in this case.

Held by the majority, that the case should be remanded for re-trial of special appellant's claim for rent as against the durputneedar, as the right of property was with special appellant by the decree.

that person. Gourmonee Dassee instituted a suit to reverse that sale, on the ground that she purchased her rights and interests in the putnee talook from Surbanee Dassee, in Bysakh 1255 B. S., or April 1848 ; and whilst that suit was pending, the petitioner brought the suit from which this special appeal arises, for arrears of rent subsequent to the date of her purchase. To this suit the durputneedar, defendant Radamohun, pleads his payments to Gourmonee, and Gourmonee, in a petition of claim, alleges that the putnee belongs to her.

The suit instituted by Gourmonee has been dismissed, and the lower court decreed the present petitioner's suit. On appeal, the judge, without considering the decision given against Gourmonee in her suit against the plaintiff, but simply from the fact of payments on the part of the durputneedar to Gourmonee, dismissed plaintiff's claim.

Against this decision the plaintiff, petitioner, has appealed specially, urging, and we think with reason, that, as the title between plaintiff and Gourmonee had been decided by the dismissal of the suit instituted by Gourmonee, it was incumbent on the judge to have looked to that decision, and to have determined whether the payments made by the durputneedar were made to Gourmonee *bona fide*, or to her as agent of Surbanee Dassee, and in whichever character they were made, whether, as the right of property was with petitioner by the decree against Gourmonee, she is not entitled as against the defendant to the rent which the defendant may again sue to recover from Gourmonee, to whom they have been wrongly paid away. We would remand the case to be re-tried with reference to the above remarks.

Mr. A. Sconce.—Special appellant, on the 1st July 1854 (1261,) purchased at an execution sale the rights and interests of Surbanee Dassee, to the extent of a 3 annas 15½ gundas share in a putnee talook, and has brought this action to recover rent due from the durputneedar of the putnee from the date of her purchase.

The zillah judge, in reversal of the decision of the principal sudder ameen, has dismissed the suit, holding it to be proved that Surbanee Dassee, the judgment debtor, had sold the share of the putnee purchased by plaintiff to Gourmonee, on 17th Bysakh 1255 ; that the durputneedar had from that date paid his rent to Gourmonee, that is, for about six years before the sale to plaintiff ; and that the durputneedar had paid, and was justified in paying, the rents now sued for to Gourmonee.

The ground now asserted against the sufficiency of the judge's decision is, that the judge had omitted to consider a fact brought to his notice at the hearing of the appeal ; that a suit, instituted by Gourmonee, to set aside the plaintiff's purchase, had been set aside

by the principal sudder ameen. No doubt it might have been proper to take some notice of this decision, but for the following reasons it seems to me to be inexpedient to remand the suit for re-hearing.

First, I observe that, while the principal sudder ameen had the present case before him, he expressly declined to take into consideration, at the same time, the issue raised in Gourmonee's suit; he treated the cases as distinct, and upon that footing his decision was passed; *second*, I observe that the durputneedar, the party sued to be liable for the rent, was no party to Gourmonee's case, and that we cannot properly ask the judge to consider to his prejudice a decision by which he cannot be bound; and, *third*, as the judge has pronounced conclusively upon Gourmonee's possession for six years, by receiving rent from the durputneedar, the mere fact that, in a separate action, Gourmonee's title has been thrown out, cannot warrant our requiring the judge to re-consider the conclusion he has come to upon actual occupancy of Gourmonee. Holding Gourmonee's possession to be proved, the judge considers that the durputneedar cannot be answerable for rent to plaintiff which he has paid to a party other than Surbanee, whose rights the plaintiff purchased.

THE 14TH APRIL 1859.

C. B. TREVOR, ESQ., Judge, and E. A. SAMUELLS and G. LOCH, ESQS.,
Officiating Judges.

Case No. 677 of 1858.

Special Appeal from the decision of Mr. E. Latour, Judge of the 24-Pergunnahs, dated 5th April 1858, reversing a decree of Baboo Ramlall Sein, Moonsiff of Nyehtutty, dated 11th July 1857.

Bamasoonderee Debea, (Plaintiff,) *Appellant*,
versus

Puddomonee, wife of Anundchunder Mookerjee, deceased, (Defendant,) *Respondent*.

Baboos Ramapersad Roy and Ashootosh Dhur, for Appellant.
Baboos Shumbhoonath Pundit, Hurkalee Ghose, and Gopal Lal Mitter, for Respondent.

THIS case was admitted to special appeal on the 11th November 1858, under the following certificate recorded by Messrs. B. J. Colvin and G. Loch.

"Plaintiff sued to obtain a money equivalent for the maintenance ('bhoron poshun') allowed her under her father's will. The moon-
tenance while in the family, did not provide for a money equivalent to be paid to her after she had left the family.

Decision of the lower court upheld, as the words of the will, which declared appellant entitled to receive the main-

siff gave a decree for the sum claimed ; but on appeal the judge reversed the decision, considering that, under the terms of the fifth paragraph of the will, plaintiff was only entitled to the maintenance so long as she continued to reside in her father's family ; that, having left it, and residing with her husband's family, and having failed to prove that she was compelled by ill-treatment to leave her paternal home, she is not entitled to that maintenance, nor its equivalent in money.

" The petitioner urges, that the judge has misinterpreted the meaning of the fifth paragraph of the will ; that the maintenance was granted for life as a charge on the family funds, irrespective of her residence or non-residence in the family ; and that the latter part of the paragraph, by which a grant of rs. 500 is made to her in the event of her having a son, for the purpose of building a separate house, clearly indicates that her continued residence in the family was not contemplated by the testator. We admit the appeal, to determine whether the construction put upon the terms of the will by the judge is correct."

JUDGMENT.

We agree in the opinion come to by the judge, that the testator never contemplated an equivalent for the " bhoron poshun" being made to the special petitioner in money, should she leave the family mansion. As long as she was in the family she was entitled to this maintenance ; and it might be a question, from the terms of the will, whether she might not still demand it ; but had the testator intended her to receive a money equivalent on her leaving the family, he would, we think, have distinctly expressed such intention. We dismiss the special appeal, with costs.

THE 16TH APRIL 1859.

C. B. TREVOR, Esq., Judge, and E. A. SAMUELLS and G. LOCH, Esqs.,
Officiating Judges.

Case No. 32 of 1857.

*Regular Appeal from the decision of Baboo Kassissur Mitter,
Principal Sudder Ameen of Hooghly, dated 21st May 1856.*

Joykishen Mookerjee and another, (Defendants,) *Appellants,*
versus

Prannath Chowdhree and others, (Plaintiffs,) *Respondents.*

*Baboos Shumbhoonath Pundit and Nobokishen Mookerjee and
Moonshee Ameer Alee, for Appellants.*

*Baboos Ramapersad Roy, Poorunchunder Roy, and Ashootosh
Chatterjee, for Respondents.*

Suit laid at Rupees 2722-11a.-18g.-3c.

PRANNATH CHOWDHREE and others in 1852 sued Radhanath Banerjee, Joykishen Mookerjee, and Rajkisto Mookerjee, inhabitants of Ooterparah, defendants, to obtain possession of 3 annas 4 gundahs share of lot Rajagrampore, together with mesne profits and interest. The case remained pending for two years, and eventually was decided in favor of the plaintiffs on the 30th June 1854. The principal sudder ameen awarded to the plaintiffs mesne profits with possession, but the decree was silent regarding interest on the same during the pendency of the suit. The defendants did not appeal, but with a view of rectifying the error committed by the lower court, the plaintiffs, on the 9th June 1855, presented a petition to the principal sudder ameen for a review of his judgment. They urged that, although more than three months had expired since the decision, of which they required a review, had been passed, still that delay had been caused by the illness of Prannath Chowdhree, who had been unable to attend to business, and also by the carelessness of their servants; that immediately the matter became known to petitioner, Prannath Chowdhree, and he was in a state to attend to business, he ascertained that a demand for interest had been made in the plaint. As, therefore, the decision of the principal sudder ameen omits to give any interest during the pendency of the suit, an item to which they were entitled without any specific demand for it, and as no other mode for supplying the omission remained, they prayed that the principal sudder ameen would review his judgment.

After the defendants had been called on to show cause why the review should not be granted, the principal sudder ameen, on the

court to review its judgment, it is not competent to the Court, on the judgment so reviewed coming up before it in appeal, to allow any objection as to the admission of the review to be again argued before it. Appeal dismissed, with costs.

Held that, when a petition for a review of any judgment of the Sudder Court, or any inferior court, is presented after three months, previously to the admission of the review, the delay must be accounted for, and those causes should be of grave importance; otherwise, litigation might be indefinitely suspended, and all the evils incident to uncertainty in the right of property incurred.

Held also, that, when this Court, on consideration of all the circumstances brought forward to account for the delay, and other reasons, has empowered a lower

30th October 1855, forwarded the record to the Sudder Court, requesting that, as the plaintiffs were clearly entitled to interest upon mesne profits for the period during which the case was pending, exclusive of interest upon the antecedent period, and as the omission to award it was an error of the court, he might be permitted to review his judgment on this particular point, in accordance with the rule laid down in paragraph 7 of the circular order, dated 11th January 1839. On the 25th April 1856 the Sudder Court empowered the principal sudder ameen to review his judgment as required by him ; and on the 21st May 1856 the principal sudder ameen passed an order, decreeing to the plaintiff before him interest upon the mesne profits decreed to him during the pendency of the suit, with costs in proportion.

To the merits of the decision in review, the defendants below, appellants before this Court, are admittedly unable to urge any valid objection. It is, however, contended by their vakeels that it is competent to this Court now to enquire into the sufficiency of the reasons given by the plaintiffs, respondents, for the delay which occurred in the filing of their petition of review, notwithstanding the previous sanction of this Court given to the review ; that those reasons, namely, the alleged sickness of one out of several plaintiffs, and the carelessness of their agents, are no reasons at all ; and that, consequently, in accordance with the late ruling of the Privy Council in the case of Maharajah Moheshur Singh *vs.* the Government of Bengal, the review granted, without due regard to the Regulation governing such proceedings, and all that has been done under it, must fall to the ground.

As laid down by the Privy Council in the recent case above cited, we think that, whenever a petition for a review of any judgment of the Sudder Court, or, we may add, any inferior court, is presented *after three months*, it is indispensable that the party preferring such petition should, in the first instance, account for the delay, and that, the delay being satisfactorily accounted for, the review is to be granted if, upon a consideration of the reasons stated, the circumstances of the case appear in justice to require it. In such cases, however, the causes accounting for the delay and intended to justify the grant of a review ought to be of grave importance, otherwise litigation might be indefinitely suspended, and all the evils incidental to uncertainty in the rights of property incurred. It follows that in all such cases, this Court, when acting under the power vested in it by Clause 3, Section IV. of Regulation XXVI. of 1814, should proceed with great care and circumspection, and never grant the review required, without hearing the circumstances which caused the delay clearly and satisfactorily stated and proved. When, however, this Court, on a consideration of all the circumstances brought forward to account

for the delay, and also of the other reasons stated, and of what the justice of the case requires, has empowered the lower court to proceed to review its judgment, we think that it is not competent to the Court, on the judgment so reviewed coming up before it in appeal, to allow any objection as to the admission of the review to be again argued before it.

Such being our view of the point raised by the appellant before us, as he is unable to object to the decision of the lower court on its merits, nothing remains but to dismiss the appeal, with costs.

THE 16TH APRIL 1859.

C.B. TREVOR, Esq., Judge, and E. A. SAMUELLS and G. LOCH, Esqs.,
Officiating Judges.

Regular Appeals from the decision of Mr. L. S. Jackson, Officiating Judge of Rajshahye, dated 15th April 1857.

Case No. 576 of 1857.

Rajah Prosunnonath Roy Bahadoor, (Plaintiff,) *Appellant*,
versus

Ishanchunder Banerjee and others, (Defendants,) *Respondents*.

Baboos Ramapersad Roy and Shumbhoonath Pundit, for Appellant.

Baboos Bungsheebuddun Mitter and Kishenkishore Ghose and Moonshee Ameer Alee, for Respondents.

Case No. 939 of 1857.

Ishanchunder Banerjee and others, (Defendants,) *Appellants*,
versus

Rajah Prosunnonath Roy Bahadoor, (Plaintiff,) *Respondent*.

Baboo Kishenkishore Ghose and Moonshee Ameer Alee, for Appellants.

Baboo Shumbhoonath Pundit, for Respondent.

Suit valued at Rupees 22,920-4a.

THIS is a suit instituted by Rajah Prosunnonath Roy to recover possession, with mesne profits and interest, of khadas 90-10 of alluvial land, appertaining to his villages of Betkhandee, Porajat, Sibrapore, &c., from which, he alleges, he was ousted during his minority by the defendants, who are proprietors of mouzas Batra and Sanbat Kunder. Three several acts of dispossession are alleged, which are said to have occurred in Bysakh 1235, Falgoon 1238, and Assin 1246, on the re-formation of certain lands which had diluviated.

The defendants deny the allegations of the plaintiff, plead the special law of limitation, XIII. of 1848, as a bar to the suit, and object to the vagueness and uncertainty of the plaint.

Suit for possession of alluvial land, on allegation of dispossession, dismissed, plaintiff having failed to make out even a *prima facie* case.

Prayer for a local enquiry refused. Local enquiries are only admissible for the investigation of points of detail. The

material facts of the case must be established in court.

The judge rejects the plea of limitation, on the ground that it had not been shown that the award of the revenue authorities, which was cited, had been made in any dispute between the parties, and dismisses the case on its merits. He observes that the plaintiff's case is wholly unsupported by documentary proof, and that the evidence of the witnesses, all of whom are ryots or dependants of the plaintiff, is eminently untrustworthy, not only from the absence of precision and the suspicious uniformity by which it is characterised, but from the very unsatisfactory manner in which it was delivered. "Not one of the witnesses," he says, "though repeatedly questioned, could say who at present cultivated a single beegah of the land in dispute," and he adds, "that no one could have heard the witnesses depose, without feeling satisfied that they were speaking, not of facts truly within their own knowledge, but purely and simply as they had been instructed."

The present appeal is preferred on the ground that the judge's estimate of the evidence is not well founded, and that he ought, in conformity with the prayer of the plaintiff, to have instituted a local enquiry.

We see, however, no reason to dissent from the opinion of the evidence which the judge has expressed. This evidence is vague and unsatisfactory in the extreme. We cannot say that it even makes out a *prima facie* case for the plaintiff, and under these circumstances no order for a local investigation can issue ; for, as the zillah judge very properly observes, local enquiries are only admissible for the investigation of points of detail. The material facts of the case must be established in court.

We therefore dismiss the appeal No. 576, with costs against the appellants. No. 939 is a precautionary appeal preferred by the defendants in the original suit against that part of the judge's decision which rejected their plea of limitation. It was quite unnecessary, and must also be dismissed, with costs.

THE 19TH APRIL 1859.

C. B. TREVOR, ESQ., Judge, and G. LOCH, ESQ., Officiating Judge.

Petition No. 1458 of 1858.

Application for Special Appeal from the decision of Mr. W. S. Seton-Karr, Officiating Judge of Jessore, dated 1st June 1858, reversing that of Moulvee Adeelooddeen, Moonsiff of Coomarkhalee, dated 28th December 1857.

Hadee Khan, (Defendant,) *Petitioner,*
versus

Muthoornath Acharj, (Plaintiff,) *Opposite Party.*

Moonshee Ameer Alee and Baboo Kishenkishore Ghose, for Petitioner.

Baboo Kishensukha Mookerjee, for the Opposite Party.

PLAINTIFF, Muthoornath Acharj, sued special appellant for possession of three pieces of land, amounting to 8 beegahs 14 cottahs, as part of an estate which he had purchased at a public sale. Plaintiff sued for possession of three pieces of land, amounting to 8 beegahs 14 cottahs, as part of an estate which he had purchased at a public sale.

The defendant Hadee Khan admits that he holds 2 beegahs 5 cottahs under plaintiff in three pieces, but no more.

The moonsiff gave a decree only for the amount admitted by the defendant to be in his possession.

On appeal, the judge decrees plaintiff's whole claim in his favor against defendant.

The defendant Hadee Khan now appeals specially, urging, that whatever claim the plaintiff may have to lands probably in the possession of others, the decree of the judge, as it stands, giving plaintiff a decree for 8 beegahs 14 cottahs against him, when it appears that only 2 beegahs 5 cottahs are in his possession, is erroneous, and contrary to justice, and that the decree, which threw the whole costs upon him, should be reversed.

We think that the judge's decision, in its present form, cannot stand, but that previously to passing a final order in the case, he should depute the court's ameen into the mofussil, with the collectorate papers, that is, with the measurement papers prepared at the time of resumption and settlement. If it should appear from them that land to the amount of that now claimed by plaintiff as within those papers is in defendant's possession, nothing will remain for the judge to do but to affirm his previous order. If a lesser quantity should be in defendant's possession, that quantity, and that alone, should be decreed against the special appellant; and plaintiff should, in a separate suit, sue

sil with the measurement papers prepared at the time of resumption and settlement, and give a decree against special appellant for the quantity of land which may actually appear by such enquiry to be in his possession. Case remitted to the judge to act as above directed.

Plaintiff sued for possession of three pieces of land, amounting to 8 beegahs 14 cottahs, as part of an estate which he had purchased at a public sale.

Defendant Hadee Khan pleads that he holds 2 beegahs under plaintiff, but no more.

The moonsiff gave plaintiff a decree for the amount admitted by the defendant to be in his possession.

On appeal the judge decreed the whole claim of plaintiff in his favor against defendant.

Held, on special appeal, that, previously to passing a final order in the case, the judge should depute the court ameen into the mofus-

the party or parties in possession of the residue, if there be any, of the land belonging to his purchased estate. The case is consequently remitted to the judge, in order that he may act as above directed.

THE 20TH APRIL 1859.

C. B. TREVOR, Esq., Judge, and E. A. SAMUELLS and G. LOCH, Esqs.,
Officiating Judges.

Cases Nos. 632 and 633 of 1858.

Special Appeals from the decision of Mr. E. F. Latour, Additional Judge of Behar, dated 26th March 1858, reversing a decree of Sheikh Soojaut Alee, Sudder Ameen of Gya, dated 27th July 1857.

Musst. Choolhun, (Plaintiff,) *Appellant,*
versus

Musst. Wajida and others, (Defendants,) *Respondents.*

Baboos Ramapersad Roy and Ashootosh Dhur and Moonshee Ameer Alee, for Appellant.

Baboos Shumbhoonath Pundit and Kishenkishore Ghose, for Muhoboo Alee, Respondent.

Baboos Shumbhoonath Pundit and Kishenkishore Ghose and Moulvees Murhumut Hossein and Aftaboodeen Mahomed, for Ashmutoonissa, Furzoonissa, and Beebee Nusseebun, Respondents.

The Mahomedan law of *shuffa* requires that a claim of pre-emption shall be preferred without delay. The judge, looking to this, threw out a suit for pre-emption, which had been instituted eight years after the cause of action arose.

Held that the limit allowed for institution of a suit by the Regulations cannot be restricted by the operation of the Mahomedan law, and the judge's order accordingly reversed.

THESE cases were admitted to special appeal on the 28th September 1858, under the following certificate recorded by Messrs. H. T. Raikes and J. H. Patton.

"Petitioner instituted a suit to enforce her right to pre-emption, and got a decree in the first court. The judge has reversed that decision, observing that petitioner had not instituted her claim until after eight years, that the cause of delay is not explained, and that plaintiff's witnesses to the '*tulub-i-moasibat*' and '*ishhad*' were not endorsed on the plaint, and for these reasons dismissed the claim. We admit the special appeal, to try whether, under the law of '*shuffa*,' as referred to by the judge, the period of general limitation not having expired, the orders of the judge should not be reversed."

JUDGMENT.

It has been clearly ruled in the case of Mahomed Danish, decided in this Court on the 1st of May 1851, that in cases of pre-emption the limit allowed for institution of a suit by the Regulations cannot be restricted by the operation of the Mahomedan law. The reason

assigned by the judge for dismissing the appeal in this case is therefore invalid ; and the case must go back, in order that the judge may consider and decide on the various issues raised by the contending parties, which he has failed to investigate.

Case No. 633 follows the above.

THE 20TH APRIL 1859.

H. T. RAIKES and A. SCONCE, Esqs., Judges, and H. V. BAYLEY, Esq.,
Officiating Judge.

Case No. 599 of 1858.

Special Appeal from the decision of Baboo Woopendurchunder Nyaruttun, Principal Sudder Ameen of Jessore, dated the 16th February 1858, reversing a decree of Baboo Tarinee-churn Mookerjee, Moonsiff of Dhurmpore, dated 10th November 1857.

Baboo Ramruttun Roy, (Plaintiff,) *Appellant,*
versus

Treporasoonderee Dassea, (Defendant,) *Respondent.*

Baboo Ramapersad Roy and Kishenkishore Ghose, for Appellant.

Baboo Gobindchunder Mookerjee and Bungsheebuddun Mitter, for Respondent.

THIS case was admitted to special appeal on the 22nd September 1858, under the following certificate recorded by Messrs. C. B. Trevor and H. V. Bayley.

"Plaintiff, special appellant, sued defendant Treporasoonderee Dassea for enhancement of her rent upon 176 beegahs of land held by her in two villages, Kearpore and Doneshdeah, 158 beegahs 5 cottahs of which are situated in the former, and 17 beegahs 15 cottahs in the latter village, and to pay it at rs. 265 annually.

"Defendant pleads that she holds the land in her possession as mookurruree under two pottahs, dated severally 1195 and 1198, the former for 101 beegahs in Kearpore, bearing a rent of rs. 20, the latter for 76 beegahs in Doneshdeah, bearing a rent of rs. 31, in all bearing a rent of rs. 51.

"The moonsiff sent an ameen into the mofussil, who found that plaintiff was in possession of the amount of land mentioned in the statement of the plaintiff; and as defendant was unable to prove her special plea, he gave plaintiff a decree according to the rate

same rent to plaintiff and plaintiff's farmer, and dismissed plaintiff's claim to enhance.

Held by the majority, that the above finding did not warrant a decree holding plaintiff to be incompetent to enhance.

Plaintiff sued defendant to enhance rent. Defendant pleaded a mookurruree tenure under two pottahs of 1195 and 1198. The moonsiff, deeming the mookurruree not proved, and defendant in possession of the land as sued for by plaintiff, decreed plaintiff's claim. The principal sudder ameen, considering the pottahs not proved, still found, from a decree of 1851, defendant had always paid the

claimed by her, which, according to the report of the ameen, was that of the village in which the lands were situated.

"On appeal the principal sudder ameen reversed the lower court's order, on the ground that, although defendant has been unable to prove her pottah, yet that it is clear, from the decree of December 1851, that she had paid the same rent both to the former ijaradar and to the plaintiff in this suit ; that, consequently, petitioner's claim cannot stand.

"Plaintiff now appeals specially, urging that, as, according to the finding of the principal sudder ameen, defendant has been unable to prove her mookurruree pottah or the payment of an uniform rate under it, a fact which she has not attempted to prove, he is under the law entitled to a decree according to his claim, which has been found correct by the lower court.

"We admit the special appeal, to try whether, as defendant has failed to prove her special pleas, a decree should not pass in accordance with the claim of the plaintiff, special appellant."

JUDGMENT.

Messrs. H. T. Raikes and H. V. Bayley.—The lower appellate court considered that neither of the pottahs pleaded by the tenant was proved. The principal sudder ameen then goes on to detail certain circumstances, such as the length of time that the jumma pleaded had been paid, the receipt of that amount of jumma by appellant's farmer, &c., from which he infers that appellant must either have made some settlement with the defendant, or had no desire to enhance ; and these reasons the principal sudder ameen holds to be sufficient now to bar enhancement. But as they afford no substantial grounds for the legal conclusion arrived at as to the incompetency of the plaintiff to enhance, we cannot allow them any weight, and must therefore reverse the judgment, with costs, and affirm that of the moonsiff.

Mr. A. Sconce.—I should have preferred to remand this case to the principal sudder ameen, that he might express a clear opinion as to the creation of the leases at the time asserted by the tenant. As it is, he observes that, as one pottah is now about seventy and the other sixty-eight years old, no witnesses could be expected to survive to attest them ; but he gives other reasons for affirming the tenures of defendants, and it may have been his purpose to hold that this indirect evidence warranted his concluding that the pottahs were genuine. If he had so stated his conclusion, it would not have been open to special appeal ; and I think the principal sudder ameen, in justice to the tenant, should have had an opportunity of stating more expressly the grounds of his judgment.

THE 20TH APRIL 1859.

H. T. RAIKES and A. SCONCE, Esqs., Judges, and H. V. BAYLEY, Esq.,
Officiating Judge.

Case No. 601 of 1858.

*Special Appeal from the decision of Mr. J. Grant, Judge of
Dinagapore, dated 5th March 1858, reversing a decree of
Baboo Juggobundoo Mookerjee, Sudder Ameen of that district,
dated 29th August 1856.*

Poorusuttum Geer Gossain, (one of the Defendants,) *Appellant,*
versus

Brij Lal, (Plaintiff,) and Dwarka Geer Gossain, (Defendant,)
Respondents.

Baboo Jugudanund Mookerjee, for Appellant.

*Baboo Shumbhoonath Pundit and Chundernath Chatterjee, for
(Plaintiff,) Respondent.*

THIS case was admitted to special appeal on the 22nd September 1858, under the following certificate recorded by Messrs. C. B. Trevor and H. V. Bayley.

Case remanded for enquiry into the issues directed; it was material, in order to know whether deceased's chelas were responsible or not for his debt, to find whether his deed of gift to them of his property was valid, whether they were in possession when the debt was contracted, or after his decease took possession as his heirs, and, therefore, liable for the burdens upon the property.

"Plaintiff sued petitioners as heirs of his debtor Rajraj. Plaintiff's suit was on a bond, dated 8th Bhadoor 1261. Defendants denied being Rajraj's heirs; but averred that they held the property of the alleged debtor by a deed of gift, dated 31st of Jeyt 1261.

"The sudder ameen was of opinion that the deed of gift was valid, and, considering the bond proved, decreed the plaintiff's suit against the estate of Rajraj, other than that covered by the deed of gift.

"The judge held, that it was not necessary to enter into the question of the deed of gift being collusive, 'as it is clear that defendants got possession of Rajraj Geer's property, and that, even by the deed of gift, they are responsible for all claims against him or his estate.' He gave a decree accordingly, holding defendants responsible.

"The defendants appeal specially, urging, *first*, that the judge should have clearly decided whether these defendants, special appellants, were in possession as heirs, irrespective of the deed of gift; *second*, that he should have distinctly adjudicated whether the deed of gift was valid, or not; *third*, that this decree is against the special appellants personally, whereas properly it could only be against Rajraj's estate in their possession.

"We admit the special appeal to try the above points."

JUDGMENT.

The special appellants stood in the relation of disciples to the deceased, on which account the deed of gift was executed in their

favor. In addition to bestowing the property he had upon them, he also invested them with the power of realising all his dues and discharging all his liabilities ; and the question intended to be raised by the appellants is that, as this particular debt was incurred by the deceased some three months after the date of the gift, they (the appellants) repudiate all liability to discharge it.

The question, therefore, to be determined is, *first*, whether the deed is valid ; and, *second*, whether, if valid, the appellants at once entered on possession of the property of the deceased, and were so in possession when this debt was contracted, or whether no such possession took place until after the death of the donor, and that the possession then taken was as his heirs, and therefore that they took the property subject to the deceased's liabilities up to the day of his death.

In coming to a final decision, the judge will also state any reason, if necessary, for not restricting the creditor, claimant, to such property of the deceased as may be in their possession.

THE 20TH APRIL 1859.

H. T. RAIKES and A. SCONCE, Esqs., Judges, and H. V. BAYLEY, Esq.,
Officiating Judge.

Case No. 541 of 1858.

*Special Appeal from the decision of Mr. E. Latour, Judge of
24-Pergunnahs, dated 19th February 1858, reversing a
decree of Mr. J. S. Bell, Additional Principal Sudder Ameen
of that district, dated 18th November 1856.*

Woomachurn Chuckerbuttee and others, (some of the Defendants,)
Appellants,
versus

Musst. Taramonee Debea, (Plaintiff,) and Musst. Rughoomonee
Debea and others, (Defendants,) *Respondents.*

Baboo Kishensukha Mookerjee, for Appellants.

Baboos Kishenkishore Ghose and Obhoychurn Bose, for Taramonee
Debea, Respondent.

Case remanded
for re-adjustment
of costs.

THIS case was admitted to special appeal on the 30th August 1858, under the following certificate recorded by Messrs. C. B. Trevor and H. V. Bayley.

"Plaintiff sued for her share of the inheritance of her deceased husband's estate.

"Defendant met her suit with two pleas : *first*, that she was barred from inheriting by unchastity ; *second*, that they had purchased some of the property of the deceased husband by three deeds of sale.

"The first court, that of the principal sudder ameen, found that the plaintiff was barred from inheriting by proven unchastity.

"The judge in appeal considered the evidence on this point, and was of opinion that the facts of the case did not bear out the principal sudder ameen's finding of unchastity. He remanded the case for re-trial as to the defendants' rights under the deeds of sale pleaded by them, and gave the plaintiff her costs up to that stage of the case.

"Defendants, special appellants, urge in their special appeal here—

1st. That the judge did not clearly find the fact of plaintiff's chastity.

2nd. That the costs should not have been awarded on a remand, but should follow or be adjusted on the eventual result of the re-trial on the remand.

"We do not think the special appeal can be admitted on the first point, for although there is not so clear and express finding of plaintiff's chastity as might have been, still it is sufficiently plain from the judgment that the judge was of opinion that plaintiff's unchastity was not proved, and that all that remained to be tried was defendants' rights under the deeds of sale.

"We think, however, the objection of the second point valid, and admit the special appeal only upon it."

JUDGMENT.

The judge's order is that "the appellant will have her costs up to this stage of the case;" and the effect of such order must be that the entire costs of the original suit in the first court, as well as those incurred in the appellate court, are thrown on the respondents.

It is possible that the judge did not mean that such should be the result of his order, as although the case has still to be tried on its merits by the lower court, no new fees are necessary for that purpose; and it can hardly be supposed that the judge intended that the question of costs should not remain an open question, until the decision had determined which party was in the right.

As, then, no special reasons have been assigned by the judge for determining that the appellant is entitled to have all the costs hitherto incurred, as required by the Court's circular order No. 191, of the 4th of November 1836, we reverse his order, and, in accordance with the general rule contained in that circular, we direct that the court, to which the case has been remanded, will determine the matter of costs in the usual way.

THE 20TH APRIL 1859.

H. T. RAIKES and A. SCONCE, ESQs., Judges, and H. V. BAYLEY, ESQ.,
Officiating Judge.

Case No. 260 of 1857.

Regular Appeal from the decision of Moulvee Mohumud Nazim Khan, Principal Sudder Ameen of Dacca, dated 25th November 1856.

Musst. Sunduloonissa Beebee, (Defendant,) *Appellant,*
versus

Gooroopersad Rae, (Plaintiff,) *Respondent.*

Mr. R. T. Allan and Baboo Shumbhoonath Pundit, for Appellant.
Baboos Ramapersad Roy and Kishenkishore Ghose, for Respondent.

Suit laid at Rupees 6350-1a-4p.

Order of lower court upheld. It was proved that the portions of new churs claimed by plaintiff were within the limits of the share held by him in the parent estate; that, after accretion and before resumption, proceedings, the ground was in his occupancy; and the statute of limitations cannot apply to extinguish his right, because of dispossession while those proceedings pended; it could run against him from the date only of their close. The special commissioner's views could bind the civil court on the question only of liability to assessment, not on other rights.

THIS suit was brought to recover possession of khadahs 63-8-4, situated in three churs, named Moheshkhalee, Bhashan chur, and Baher chur, which, subsequent to the release of the land by the revenue authorities after proceedings had been held under Regulation II. of 1819, had been wrongfully retained by the defendant, appellant. The relative position of the parties brought before the Court in this action is as follows. Previous to the permanent settlement, an estate, known by the name of pergunnah Russoolpore, was situated within the Dacca district, of which a 5-anna share became, also before the completion of that settlement, a distinct estate. Further, it appears that, for the purposes of the settlement, and in recognition of the rights vested therein, the remaining 11-anna share was taken to represent a full estate, and in its turn became divisible into three shares, namely, a 6-anna share and two 5-anna shares. In course of time plaintiff, respondent, became proprietor of one of the two last mentioned 5-anna shares, and defendant, appellant, as representative of her minor sons, proprietor of the 5-anna share which became first separated. Both parties therefore, it is to be understood, are proprietors of pergunnah Russoolpore; and it is by virtue of the right so possessed by them that their title to hold the land now disputed is severally asserted.

Both sides admit the disputed land to be recently formed churs, both say that the formation accreted on the sites of certain old villages of the pergunnah, which had been washed away by the river, and both say that, ever since the new formation of the churs, they, or the proprietors whom they represent, were in possession of their respective shares, while the ground of the plaintiff's action is, that his right became illegally and forcibly interrupted in the course of the resumption operations already adverted to.

Upon these averments, the finding of the principal sudder ameen is, that the old lands which had been carried away were comprised within villages which had constituted a portion of the share of the pergunnah that devolved on plaintiff; that the former proprietor of plaintiff's share enjoyed a proportionate share of those older lands; that he or plaintiff also acquired and enjoyed a proportionate share of the new formations, and accordingly he considered the plaintiff's claim, as against the exclusive right set up by the defendant, appellant, to be established. Further, in applying the same facts, the principal sudder ameen held that the suit was not barred by the law of limitation. It appears that the first order made in the matter of resumption was pronounced by the special deputy collector, on the 12th March 1839, when khadahs 339 were released in favor of Akhlakoollah Chowdhree, husband of appellant, but on appeal was carried by plaintiff and others to the special commissioner; and on the 16th September 1845, this officer determined that the appellants before him were entitled to a share of the land supposed not to be resumable, on the same principle that a quota had been given up to Akhlakoollah Chowdhree. Accordingly, the principal sudder ameen has held that the final orders of the special commissioner should be taken to constitute plaintiff's cause of action, and that the suit brought within twelve years from that date is in time.

The same issues have been raised here that were raised below. First in course comes the issue of limitation, but this, it was allowed, was a mixed issue involving and dependent upon the view taken by the Court of the facts of possession asserted by the parties. Now as to these facts, the conclusion of the principal sudder ameen has not been in any way controverted. The principal sudder ameen held that the old land, which before the diluvion occupied the site subsequently occupied by the new churs, was comprised within the share held by plaintiff in the parent estate, and this point is no longer contested. Again, the principal sudder ameen held plaintiff's possession of the new land, subsequent to accretion, and before the resumption operations, to be established by the evidence which he recites; and here also, as to the force of that evidence or by the submission of counter-evidence, the conclusion of the principal sudder ameen has not been shaken. We are clearly of opinion that the interruption caused to the plaintiff's occupancy of the land, by the resumption operations, cannot run against him till the resumption suit was finally closed by the special commissioner's proceedings of 1845.

As just said, we have had no evidence before us to affect the principal sudder ameen's finding as to the plaintiff's actual occupancy either of the old or of the new land. The reliance of appellant has been placed on the proceedings of the deputy collector in

1839, and of the special commissioner in 1845. It is shown to us that, in the opinion of the special commissioner, plaintiff was not entitled to share in the churs Moheshkhalee and Bhashan, and that, while his right to a portion of Baher chur was recognised, the portion so released was in addition to the 339 khadahs given by the deputy collector to Akhlakoolah Chowdhree, husband of appellant. Now, while the jurisdiction of the special commissioner is conclusive as to the liability of certain land to assessment, his opinion as to right of possession in the land which formed the subject of the proceedings held before him cannot bind the civil court. It may be that we should be prepared carefully to consider any views expressed by the special commissioner, as to questions of possession brought out in the course of the resumption proceedings. But, in the present case, Baboo Shumbhoonath Pundit has been unable to show us upon what evidence or upon what data the opinion of the special commissioner, with respect to the interest of plaintiff in chur Moheshkhalee and Bhashan, was based; and so appellant fails in establishing her exclusive title, quite as much with respect to evidence adduced before the special commissioner, as she has failed, as already shown, in the present action. Further, as to Baher chur it is admitted that the special commissioner erred in his estimate as to the total quantity of land available for all the parties concerned. It was supposed that, in addition to 339 khadahs to be given to Akhlakoolah, 669 khadahs were available to be given to the other shareholders of pergunnah Russoolpore; but eventually the total available land was ascertained to be 328 khadahs, and upon that quantity the apportionment of the plaintiff's right must be made.

Lastly, as to the Baher chur land, a special objection is raised upon the following ground. This chur is assumed to be identical with another chur called Ramkishtodhee, and as (defendant's) appellant's original share of the old land of Ramkishtodhee is admitted to have amounted to one-half thereof, so appellant asserts her title to hold one-half of Baher chur. But here again we have assertion without proof. It is true that the special commissioner appears to have treated Ramkishtodhee and Baher chur as one and the same; but before ourselves no evidence is brought which should show the identity of the two churs, or that appellant, after the formation of Baher chur, held an 8-anna share of the land.

We dismiss the appeal, with costs.

THE 21ST APRIL 1859.

H. T. RAIKES and A. SCONCE, Esqs., Judges, and H. V. BAYLEY, Esq.,
Officiating Judge.

Case No. 24 of 1858.

Special Appeal from the decision of Mr. W. S. Seton-Karr, Officiating Judge of Jessore, dated the 14th July 1857, reversing a decree of Baboo Opendurchunder Nyaruttun, Principal Sudder Ameen of that district, dated 18th February 1856.

Ramtunnoo Pal, (Pauper,) one of the Plaintiffs, *Appellant*,
versus

Mr. R. Savi, Jr., and others, (Defendants,) and Mussumat Mookta-kassee, wife of Chundur Mozoomdar, (one of the Plaintiffs,) *Respondents*.

Baboos Bungsheebuddun Mitter, Taruknath Sein, and Sreenath Dass, for Appellant.

Mr. R. T. Allan and Baboo Jugudanund Mookerjee, for Mr. R. Savi, Jr., and others, Respondents.

THIS case was admitted to special appeal on the 15th January 1858, under the following certificate recorded by Messrs. A. Sconce and J. S. Torrens.

"Petitioner comes up as pauper. He was plaintiff in this suit, which he instituted to recover a share in three different under-tenures.

"First, as to a durputnee talook. It appears that this talook, as admitted by the defendants, was held by three parties, Ramtunnoo, Mudhoosoodun Pal, and Peareechurn; that these three parties were sued for arrears of rent, and Mudhoosoodun, being arrested, admitted the claim made to be due; and that a decision on the 30th April 1850 was passed against him, discharging at the same time his co-defendants. Further, on the 10th February 1851, the jumma in question was sold for the arrears due by Mudhoosoodun.

"The judge has held that there was no legal defect in selling the entire jumma for arrears decreed to be due against Mudhoosoodun only; and petitioner grounds his application for a special appeal on this finding, arguing that his right in the talook could not be admitted by virtue of an arrear being decreed due by one sharer only.

"Two other pleas taken with respect to the other properties are inadmissible: but directing the usual enquiries to be made into the pauperism of petitioner, we would admit this application conditionally, to try whether a decree in this case should not pass in favor of plaintiff for one-third share of the durputnee abovementioned.

The plea that the rights and interests of one judgment debtor or only were sold was not proved. Where clear proof is not given that distinct shares of a jumma are so recorded in the serishta of the superior landlord, the tenure must be treated as a joint one, and thus liable, under Section XV. Regulation VII. of 1799, to sale for the default of one; the tenure itself being that to which the superior landlord has to look for the realisation of his rent.

JUDGMENT.

Messrs. H. T. Ravikes and H. V. Bayley.—In this case it appears that Mudhoosoodun Pal, Ramtunnnoo Pal, and Peareechurn were sued, in a summary suit, for rs. 54, the alleged jumma of their durputnee tenure. Mudhoosoodun, on being arrested, admitted that that was the jumma due by him and by the other two parties sued. A soolehnamah was entered into with him, on the basis of which a decree was passed against him only. The other parties were specifically released by the terms of the decree. The sum so decreed against Mudhoosoodun Pal not having been paid by him, the tenure was sold under Act VIII. of 1835.

A suit was brought by Ramtunnnoo Pal and another to recover possession from the purchaser. It was then pleaded that the entire tenure could not be sold for a decree against one defaulter.

The lower appellate court held that the whole right of the plaintiffs therein became finally extinct, by the purchase of the said durputnee talook, when the property of Mudhoosoodun Pal was sold for a decree.

Against this holding Ramtunnnoo appeals specially, and his appeal has been admitted to try whether he should not have a decree for one-third of the durputnee.

The pleader for special appellant relies on the decree having been against Mudhoosoodun only, and on the fact of Ramtunnnoo and Peareechurn having been specifically released, and that, *consequently*, all that could be or was sold were Mudhoosoodun's rights and interests.

As to this last point we observe that it has not been shown to us by special appellant that only Mudhoosoodun's rights and interests were sold. But irrespective of that, we are clearly of opinion that where, as here, clear proof is not given that distinct shares of a jumma are so recorded in the *serishta* of the superior landlord, the tenure must be treated as a joint one; and, as such, the whole property is, under Section XV. Regulation VII. of 1799, liable to sale for the default of one of the parties, the property, not the parties, nor any one of them, being that to which the superior landlord has to look for the realisation of his rent. We dismiss the special appeal, with costs.

Mr. A. Sconce.—I observe that the summary suit brought before the collector for arrears due, and which terminated by a compromise executed by Mudhoosoodun only, expressly set forth that the occupants of the under-tenure and the so-called defaulters were the three men, Ramtunnnoo, Mudhoosoodun, and Peareechurn. Eventually one only of these three, that is Mudhoo, confessed judgment; and upon this judgment the sale of the whole tenure

was made. Upon these facts we had no contest ; and as it seems to me to be a clear rule of law that the interests of one man cannot be prejudiced by the acts of another, that is, that Ramtunnoo, a registered tenant, not determined to be a defaulter, cannot suffer for the default of Mudhoo, I would restore special appellant to his former possession of the talook.

THE 23RD APRIL 1859.

H. T. RAIKES and A. SCONCE, ESQS., Judges, and H. V. BAYLEY, ESQ.,
Officiating Judge.

Cases Nos. 533, 534, 535, and 536 of 1858.

Special Appeals from the decision of Mr. F. A. Glover, Officiating Judge of Rungpore, dated 11th May 1857, reversing a decree of Moulvee Itrut Hossein Khan, Principal Sudder Ameen of that district, dated 16th April 1856.

Baboo Protab Singh Dookur, (Plaintiff,) *Appellant,*
versus

Rajah Soorujnarain Singh, (Defendant,) *Respondent.*

The Advocate General, Baboos Ramapersad Roy and Bungsheebuddun Mitter, and Mr. R. T. Allan, for Appellant.
Baboos Shumbhoonath Pundit and Bhoobunmohun Roy, for Respondent.

THESE cases were rejected by Messrs. Raikes and Colvin on the 28th November 1857 for the following reasons.

"These applications are all of one kind, and refer to the interpretation to be put upon the terms of a karbarnamah, which we consider the judge to have rightly understood, as has been declared in the judgment of this Court (Mr. Patton concurring with us,) dated 24th instant. Our decree in that case was based upon the fact of the bond involved in it not extending the sums borrowed beyond rs. 15,000, but the amount which could be borrowed had then been drawn. The present bonds are in excess of what in consequence could be borrowed by Ramchunder Sircar, in whose name the karbarnamah was executed.

"We reject these applications."

A review was admitted on the 20th March 1858 by Messrs. Raikes and Colvin.

"The advocate general, in support of this application, has argued that the suit by his client, for the recovery of the sums secured by the bonds filed in the lower court, has been wrongly dismissed by

Defendant resisted claim of debt on certain bonds made by his agent with the plaintiff, on the ground that his agent exceeded the authority vested in him by the terms of his karbarnamah ; but the loans had been recognised by defendant, and the monies paid to his use and benefit, and he could not recede now from his liability. As, however, a set-off was pleaded, case was remanded in order that the accounts might be sifted.

that the accounts might be sifted.

the judge on the construction put by him upon the karbarnamah. That deed, it is urged, was intended to have a continuing effect, one of the objects contemplated by it being the payment of the Government revenue as it fell due from the estates of the principal defendant, and, consequently, so long as the debt did not at any time exceed the full amount of rs. 15,000, the terms of the deed were complied with, and the liability of the principal defendant unquestionable. If, however, the Court be of opinion that so liberal a construction cannot be accepted as clearly deducible from the wording of the deed, yet it must be conceded that there is sufficient ambiguity to allow of the interpretation put upon it by both the plaintiff and the agent, both of whom, it is admitted by the court below, acted in perfect good faith in advancing and appropriating the several sums to the benefit of the principal defendant, who likewise in his reply admits the payments to have been made on his account and for Government revenue of his estates ; and this ambiguity being admitted, there is on the record a clear admission, on the part of the defendant, that the sums sued for were knowingly allowed by him to be made use of by the collector as payments on his part. Such payments, therefore, having his assent and being manifestly for his benefit and for arrears for which he was liable, the advocate general argued that he was bound to prove his allegation that these several sums had been repaid, and that this was, under the circumstances of the case, the real issue to be tried, and not simply whether or not they could be considered as coming within the authority delegated by the magistrate by the karbarnamah alluded to. The review therefore prayed for should be granted, and the special appeal re-considered. Admitting the force of these arguments as to the apparent miscarriage of the judge in not determining upon the point now raised, we are willing to review the special appeal as to whether the matter now submitted will justify an admission of the special appeal when again before us."

These cases were admitted to special appeal on the 26th August 1858 by Messrs. Raikes and Patton on the following grounds.

" With reference to the order of this Court, granting a review of these petitions on the grounds therein stated, we admit the special appeals in these four cases, to determine whether the defendant be not liable for the account claimed, on the ground that he has admitted the receipt of these sums by his agents, and their appropriation to his benefit as Government revenue due from his estate, and his allegation of having repaid the same, although the terms of the karbarnamah may not, in the sense of that document, as held by the judge, have justified the agent in borrowing the amount upon the responsibility of the defendant."

JUDGMENT.

The four special appeals now before us relate to four suits brought for the recovery of money lent upon four bonds in the course of the years 1255 and 1257 for the aggregate sum of 6949-10-9. The debts were contracted on behalf of Rajah Soorujnarain Singh Rae Bahadoor, by his agent Ram Chunder Sircar, ostensibly under a deed called a karbarnamah ; and the zillah judge has thrown out all the suits, because the agent, in borrowing the money now sued for, exceeded the power conferred upon him by his principal according to the terms of the karbarnamah. This deed limited the money to be borrowed by the agent at one time to the amount of rs. 15,000, including an outstanding debt of rs. 4052-9 : and the judge finding that the total debt outstanding in the year 1255, when the first of these four loans was contracted, exceeded rs. 15,000, has held that the agent went beyond his authority, and that the creditor could not recover the money lent.

The point raised in special appeal is, that as the rajah defendant, in his answer to the several claims of the plaintiff, expressly admitted the payment to his agent of the amount of the loans and the appropriation of that amount to the discharge of public revenue due by him, and asserted that the money so borrowed had been repaid by various sums lodged by him with the plaintiff, the literal terms of the karbarnamah could not, under such circumstances, be adhered to.

The statement made in the (defendant's) respondent's answer is, that, up to Maug 1253, rs. 3535-1 was due by him ; that on the dates specified the four loans now sued for had been borrowed from the plaintiff's house for the discharge of the revenue of his estate ; that the old and new loans made a total debt of rs. 10,479-11-9 ; that on various dates between Bhadro 1254 and Maug 1259 he had paid into the plaintiff's banking house rs. 22,646-2-10 ; and thus he concluded that, after deducting the sum which he owed to plaintiff, the latter was largely in his debt.

On the part of defendant, respondent, it has been urged, in explanation of the foregoing answer, that it should be taken in connection with the subject-matter of a fifth suit to which it referred, as well as to the present four suits. That fifth suit embraced a loan of rs. 6464-15 made in 1253, and was disposed of in this Court in favor of plaintiff on the 24th November 1857. Then, as now, defendant resisted the claim as exceeding the condition of the karbarnamah ; but the Court determined that the total loans up to 1253 had not exceeded rs. 15,000, and that defendant was strictly liable under the authority of his own deed. Defendant denying the debt of rs. 6464-15, that sum was necessarily excluded from the sum of

rs. 10,474, which in his answer he admitted. But his recognition of these four loans remains ; and what we have to consider is whether, even upon the supposition that these more recent loans for rs. 6944 were in excess of the sum of rs. 15,000, which his agent was empowered to borrow, defendant should not be held liable for debts which, by his own distinct admission, were paid to his use and benefit. We cannot doubt that the defendant must be held to have ratified the acts of his agent. He has indeed expressly recognised the acts of his agent in these four special loans ; and he cannot be permitted to recede from loans which he allowed were originally made for his benefit and himself brought into the accounts outstanding between himself and plaintiff. The actions, therefore, cannot be thrown out on the ground of want of power in the agent ; but as the defendant, respondent, pleaded a set-off, the cases must be remanded to the zillah judge that he may go into the accounts referred to by the defendant, and determine whether any and what sum is due to the plaintiff.

THE 23RD APRIL 1859.

C. B. TREVOR, Esq., Judge, and E. A. SAMUELLS and G. LOCH, Esqs.,
Officiating Judges.

Case No. 591 of 1858.

Special Appeal from the decision of Mr. A. Pigou, Officiating Judge of Moorsheedabad, dated 11th March 1858, reversing a decree of Baboo Gobindchunder Chowdhree, Principal Sudder Ameen of that district, dated 16th November 1857.

Indurchunder Jhajur, (Defendant,) Appellant,
versus

- Malkannissa Begum *alias* Larlee Begum, (Plaintiff,) Respondent.
Baboos Unookoolchunder Mookerjee and Ashootosh Chatterjee and Mr. R. T. Allan, for Appellant.
Baboo Skumbhoonath Pundit and Moulvee Lootfur Ruhman, for Respondent.

Held, that in an action of detinue, in which the plaintiff sues to recover certain specific articles or their value, it is incumbent on plaintiff, if the defendant pleads the general issue, and if the

THIS case was admitted to special appeal on the 20th September 1858, under the following certificate recorded by Messrs. H. T. Raikes and H. V. Bayley.

"Petitioner was defendant, and the plaintiff sued him for the value of a necklace and earrings left in pledge for rs. 1000, which plaintiff borrowed from the defendant. Plaintiff valued the necklace at rs. 2500, and the earrings at 500. Petitioner denied having lent money to the plaintiff and having received the ornaments in pledge.

"The first court held it proved that defendant had lent the money and received the necklace only, but that the plaintiff had not repaid the money, and valued the necklace at rs. 1500 only.

"In appeal the judge considered the evidence sufficient to establish that plaintiff had borrowed and repaid the money, and had left in pawn with the defendant both the earrings and the necklace, and that plaintiff was entitled to recover the full value set upon them in her plaint.

"The plea urged in special appeal is, that plaintiff cannot recover the estimated value of the necklace, without proving its value to be as stated by her. Defendant having denied the transaction *in toto*, throws upon plaintiff the onus of proving the actual value of the necklace pledged.

"We think that, under any circumstances, plaintiff is bound to prove that the value set upon the necklace is correct; and we admit the special appeal to try whether the case should not be remanded for this purpose."

JUDGMENT.

We think that, in an action like the present, which is in the nature of *detinue*, and in which the plaintiff sues to recover certain specific articles or their value, it is incumbent on plaintiff, if the defendant pleads the general issue, and if the specific articles be shown to the court's satisfaction to have been in defendant's possession, to prove the value of each article before an alternative judgment can be given in his favor.

There are cases in which on pleas, special in their nature, being advanced, failure to prove them gives a plaintiff a right to a decree for his claim as laid in the plaint without further evidence, on the ground that by his pleading the defendant allows the justice of plaintiff's claim, unless the special plea be admitted by the court; but cases like the present do not fall within that category; in these cases there is no special plea advanced, but on the general issue being pleaded two points arise for determination:

1st. Were the articles sued for in defendant's possession? and,

2nd. If so, what was the value of them?

Both these issues the plaintiff must clearly prove, as we have before observed, before he can be entitled to an alternative judgment.

Under this view of the case we remit the case to the judge, with directions that he will give a judgment, on the whole evidence before him, regarding the value of the ornaments, which he has found to have been illegally detained by the defendant.

specific articles be proved to have been in defendant's possession, to prove the value of each article before an alternative judgment can be given in his favor.

Held, also, that cases of this nature are not within the same category with those in which, on a special plea being alone pleaded and not proved, that failure entitles the plaintiff to a decree for his claim as laid in the plaint without further evidence.

Case remitted for further investigation.

THE 23RD APRIL 1859.

A. SCONCE and C. B. TREVOR, ESQS., Judges, and H. V. BAYLEY, Esq.,
Officiating Judge.

Case No. 658 of 1856.

Regular Appeal from the decision of Baboo Punchannun Banerjee, Principal Sudder Ameen of Rajshahye, dated 26th June 1856.

Nawab Nazim of Moorshedabad, (Plaintiff,) *Appellant,*
versus

Ranee Indurmonee, widow of Rajah Gungadhur Roy, and mother
and guardian of Mohundurnarain Roy, and Kaleekoomar Ghose,
the executor, (Defendants,) *Respondents.*

Baboos Ramapersad Roy and Hurokalee Ghose and Mr. R. T. Allan, for Appellant.

Baboos Bungsheebuddun Mitter, Kishenkishore Ghose, and Gobindchunder Mookerjee, for Respondents.

The suit was brought for possession of a mehal on an alleged deed of compromise, by which defendant was stated to have transferred such mehal, and on an alleged admission in a plaint, where present defendant was plaintiff, in which plaint, it was alleged, the receipt of the consideration for such transfer was admitted.

Held that, in considering alleged admissions, it is of the first importance to adhere to the rule of evidence, which prescribes that the whole statement containing the admission be taken together, as by this means alone can the true nature of such admission be ascertained.

Held also, that, under this rule, there is no admission in this case of the receipt of rs. 72,000 for the defendant's own purposes, or of its appropriation for objects other than the payment of plaintiff's (the Nawab Nazim's) debts. Nothing was shown to prove that any consideration passed from plaintiff to defendant to justify the conclusion, that the defendant had still to account for rs. 72,000, and had given up the mehal sued for to plaintiff for that reason.

THIS suit is brought for the possession of Deh Darosha, and is laid at rs. 14,132-8-6.

The plaintiff's averments are, that Gungadhur Roy was the dewan of Nawab Nazim Humayoon Jah, and embezzled rs. 72,000 from that Nawab's private treasury, which was termed the kumbundar khana; that the defendant, Ranee Indurmonee, his widow and mother and guardian of his son, was sued by the Governor-General's agent for that amount and interest, which together had then amounted to rs. 1,53,600; that when this suit had proceeded to some length, the ranee, considering the debt in question to have been actually due by her husband, gave up to the Nawab Nazim the Deh Darosha now in suit by a deed of the 18th Cheyt 1253, and a decree was given accordingly; but that upon the Nawab's proceeding to take possession he could not obtain it. It was added that Rajah Gungadhur had acquired that estate in two portions, *i. e.* 11a.-8g.-2c.-2k. by a deed of sale from Bejoygovind Bural and Anundmoyee Dasse in the name of one Jeunarain; and 4a.-11g.-1c.-1k. under a deed of compromise by Anundmoyee; and that certain shareholders had sued Bejoygovind and the ranee, and Kalee Koomar, Rajah Gungadhur's executor, for 8a.-11g.-2c.-2k. as their share of the mehal, and to set aside Bejoygovind's deed of sale to Gungadhur; but although this suit was decreed in

the zillah, the decree was reversed by this Court on the 27th April 1852. Plaintiff, in conclusion, states that he sues on the deed of compromise above referred to.

The ranee admits that her husband Gungadhur was dewan in the time of the Nazim Humayoon Jah, but denies that he ever embezzled anything, or that she, in the suit brought against her by the Governor-General's agent, ever admitted the amount then sued for to be justly due or filed any deed of compromise ; further, that there was nothing shown by plaintiff to prove that Rajah Gungadhur had received, appropriated, or not duly accounted for the rs. 72,000 referred to in that suit ; that Gungadhur, although he had not been successful in proving his claim, had all along claimed to recover balance due on account of money he had borrowed to pay the Nawab's debts, giving due credit for rs. 72,000, at rs. 4000 per mensem assigned from the Nawab's private treasury, from Poos 1235 to Jeyt 1237. Lastly, the ranee denies ever offering to give up possession to the Nawab, and alleges that during her illness the rajah's adopted son, in collusion with the Nawab's omlah, attached her seal to the alleged deed of compromise.

The answer of Kaleekoomar, the executor, is to the same purport, in denial of plaintiff's claim.

The principal sudder ameen held that there was no proof that Rajah Gungadhur had embezzled the rs. 72,000 before sued for by the Nawab on that ground ; that the present claim arose from a suit by Gungadhur against the Nawab, decided in the zillah court on the 28th December 1839, and in this Court on the 19th June 1841, in which he mentioned credits given to him for rs. 4000 per mensem for eighteen months, which he had paid to the Nawab's creditors, and which were irrespective of his claims for money advanced by him on account of the Nawab ; but that, although Rajah Gungadhur failed to prove these claims, there was in that or otherwise no proof of his having appropriated the sum ; that as, on his dismissal from the dewanship, Gungadhur was alleged to have given an acknowledgment to be responsible for what, on an adjustment of accounts, might be proved due by him, proof that this sum was so found due was requisite and was wanting here ; that the ranee had not admitted the deed of compromise ; and that that deed would not bind the minor. He, therefore, dismissed the Nazim's suit.

The Nawab Nazim appeals from this decision, on the ground that the deed of compromise has never been set aside, and, being thus valid, entitles him to a decree ; that that deed was an acknowledgment of the Rajah Gungadhur's liabilities for the rs. 72,000, and thus for the mehal sued for now ; that that deed was executed for the benefit of the minor, and must be held to bind him.

JUDGMENT.

As the main arguments urged before us in appeal rest on the admissions said to be found in the deed of compromise, and in Rajah Gungadthur's plaint, dated 14th December 1855, we give the passages relied on below. The former runs thus : " Although neither your petitioner (*i. e.* Ranee Indurmonee) nor Rajah Bidyadthur (*i. e.* the rajah's adopted son) holds by right of inheritance any estate left by the rajah, all his property, real and personal, having been sold for his debts, after his death, except Darosha, still, considering that all the honor and respect the rajah enjoyed arose from his connection with the Nazim, it would be improper to contend in law suits with the Nizamut, and an amicable adjustment is agreed to, *viz.* Darosha is given up to the Nazim, the agent withdrawing this suit and paying costs in it and in that in which the Rajah Gungadthur was plaintiff, all claims in both suits being considered settled. "

This passage does not, in our opinion, admit a debt of rs. 72,000, but distinctly alleges another reason for the compromise, *viz.* unwillingness in the widow to litigate with the Nizamut, from his connection with which Rajah Gungadthur, her husband, had risen to a high position.

The terms of Rajah Gungadthur's plaint relied on by plaintiff, appellant, are these. In one part occurs the passage : " From the beginning of Poos 1236 B. S. to Jeyt 1238, eighteen months, your petitioner received rs. 4000 per mensem, 72,000, from the private cash of the Nizamut, according to the instalments previously arranged and sanctioned." In another passage : " In conformity with this arrangement the said Misr executed a power of attorney in favor of Brijbullub Dass, my dependent, who, by virtue of it, drew rs. 4000 from the private cash, and divided the same before me between the said Misr and other creditors." But, on looking to the context, there is far from any admission of a receipt for Gungadthur's own purposes, or for a receipt of money unaccounted for, to the amount of 72,000, or any amount at all. The tenor of the whole of this part of the plaint is, that the Nazim was very much in debt ; that the dewan Gungadthur borrowed money to pay those debts ; that these creditors pressed the dewan for payment, when the Nazim sent for a banker, named Ramdyal Misr, and desired him to take over and adjust the claims of the creditors, the banker receiving rs. 4000 per mensem from Poos 1836, from the Nazim's private treasury, until the debt was cleared off ; that three perwannahs were issued accordingly, one to the banker, another to Gungadthur as dewan, and a third to the darogah of the private treasury. The plaint then states that the banker, Ramdyal Misr, pending reference to other parties as to taking over all the claims against the Nazim,

amounting to rs. 171,748, suggested that the rs. 4000 per mensem from the private treasury should be at once made available, and that they were so, and paid over to the banker's agent and other creditors, before the dewan. It is then stated that, before the reference was replied to, Ramdyal died, and the Nazim then desired the dewan to receive the rs. 4000 and pay the creditors, which he did, duly apportioning it to the creditors; that this monthly receipt by him of rs. 4000 was for eighteen months, from Poos 1236 to Jayt 1238, rs. 72,000; but that in Assin 1238 the Nazim stopped the payment.

In considering an alleged admission by the defendant, we think it of the first importance to adhere to the rule of evidence, which prescribes that the whole statement containing the admission must be taken together, as by this means alone can the true meaning of the admission be ascertained. Acting, then, on this rule, and looking to the plaint as a whole, and then the passage relied on from the plaint in connection with the general tenor of the document above given, we see no admission of any receipt of rs. 72,000 for the rajah's own purposes, or its appropriation for objects other than the payment of the Nazim's debts under the alleged authority of the Nazim. Nothing is shown us, in support of the present claim, to prove that any consideration really passed into the hands of Rajah Gungadhur from the Nazim, to justify the conclusion that he had received it for himself, or still had to account for the rs. 72,000, on account of which the defendant is stated to have given up the mehal Darosha now in suit.

We, therefore, dismiss the appeal, with costs.

THE 23RD APRIL 1859.

C. B. TREVOR, ESQ., Judge, and E. A. SAMUELLS, ESQS., Officiating Judges.

Case No. 501 of 1857.

Regular Appeal from the decision of Roy Ramlochun Ghose, Principal Sudder Ameen of Nuddea, dated 19th March 1857.

Woomeshchunder Roy and others, (Defendants,) *Appellants,*
versus

Eshanchunder Roy and others, (Plaintiffs,) *Respondents.*

Baboo Jugudanund Mookerjee, for Appellant.

Mr. R. T. Allan and Baboo Shumbhoonath Pundit, for Respondents.

Suit laid at Rupees 6634-12a.-11g.-3c.

THIS is a suit for the rent of an ijara from 1254 to 1257 B.S., founded on a kuboolyut. The principal sudder ameen decreed the claim in plaintiffs' favor. The defendants appeal against this A durputnee-dar obtained possession of putnee for

a short time under Clause 4, Sect. XIII. Regulation VIII. of 1819, in consequence of the putneedar's having withheld his rent. The plea of the ijaradar, in whose firm the putnee was included, that he was not liable for the rent of the putnee during this period, overruled, as he could not be permitted to take advantage of his own laches to evade his contract with his lessor.

Neither of these objections, however, appears to be entitled to the slightest weight. The durputneedar, it seems, obtained possession of the putnee under the provisions of Clause 4, Section XIII. Regulation VIII. of 1819, in consequence of the defendants' having withheld the rent due to the zemindar, and thereby jeopardised his tenure. The defendants clearly cannot be allowed to take advantage of their own laches in order to evade their contract with their lessors. They had it in their power to recover possession of the putnee at any moment, by repaying the advance made by the durputneedar, and it is no answer to the plaintiffs' claim to say that they failed to do so.

With regard to the exclusion of the defendants' evidence, we find the facts to be these. The parties were called upon to file their proofs on the 22nd of August 1856. The 17th of December was the date fixed for the hearing of the cause. There was a subsequent postponement to the 26th of February 1857. On that date the defendants, for the first time, intimated their intention to put in a certain hathchitta, and on the 27th they filed a copy of this document with a list of witnesses. No satisfactory reason having been given for this delay, and the record having been made up, the principal sudder ameen regarded this proceeding of the defendants as a mere expedient for retarding the decision of the case, and rejected their application for further time. In this we are of opinion that he was fully justified.

We affirm the decision of the lower court, and dismiss the appeal, with costs.

THE 23RD APRIL 1859.

H. T. RAIKES, ESQ., Judge, and H. V. BAYLEY, ESQ., Officiating Judge.

Petition No. 28 of 1859.

Application for Special Appeal from the decision of Moulvee Mahomed Haniff Khan, Principal Sudder Ameen of Patna, dated 15th September 1858, reversing that of Hafiz Surfuraz Alee, Sudder Moonsiff of that district, dated 25th March 1858.

Doyaleeram, Plaintiff, Petitioner,
versus

Cheydeelal and others, Defendants.

Moonshee Abbas Alee, for Petitioner.

Moonshee Ameer Alee, for the Opposite Party.

It is hereby certified that the said application is granted on the following grounds.

The special appellant pleads that the principal sudder ameen has wrongly held that the plaintiff's suit should be dismissed for minority, and that, even if the principal sudder ameen found as a fact, on the evidence, (which it was admitted the principal sudder ameen had done,) that plaintiff was a minor, the suit should have been nonsuited and not dismissed.

The respondents having been summoned, and the record having come up to this Court, the respondents' pleader declining to appear, we have referred to the judgment of the principal sudder ameen, and find the case to stand thus. The plaintiff, who first sued, died two months after filing the suit, and was the son of the party now admitted as his son's heir to sue. Therefore, irrespective of the pleas of special appellant, it is obvious the suit should not have been dismissed, for the defect which precludes minors' suing is that arising from their being unable to have legal liabilities or do legal acts in their own name, so as to afford security to meet the claims of others or to bind themselves. When the plaintiff's father was admitted to sue as his son's heir, the defect was cured, and the suit could proceed.

We reverse the decision of the principal sudder ameen, and remand the case to him for re-trial with reference to the above remarks.

A son having sued and having died during the pendency of the suit, his father, as his son's heir, represented him in the suit. The lower court deemed that, the original plaintiff having been a minor, the suit must be dismissed.

Held, that the defect which precludes minors from suing is that arising from their not having legal liabilities; and that, when plaintiff's father sued as his son's heir, this defect was cured.

THE 25TH APRIL 1859.

J. H. PATTON, ESQ., Judge, and E. A. SAMUELS, ESQ., Officiating Judge.

Petition No. 30 of 1859.

Application for Special Appeal from the decision of Mr. G. L. Martin, Judge of Tirhoot, dated 29th July 1858, affirming that of Mr. E. Dacosta, 1st Principal Sudder Ameen of Tirhoot, dated 22nd December 1857, in the case of

Soobun Singh Plaintiff,
versus

Baboo Goordyal Singh, one of the Defendants, Petitioner.

Baboo Baneymadhub Banerjee and Kishensukha Mookerjee and Moonshee Ameer Alee, for Petitioner, Ex-parte.

IT is hereby certified that the said application is granted on the following grounds.

The plaintiff obtained specific decrees against his co-sharers individually. Only one appealed, on the ground that he had already paid his quota in full. The judge refused to hear the appeal, because the other sharers had not been made respondents. The plaintiff sued special appellant and his other co-sharers, for recovery of the revenue which he had paid in excess of his own share, in order to save the joint estate from sale, and obtained a specific decree against each shareholder in the lower court. The special appellant, whose plea was that he had paid his quota in full, and was not indebted to the plaintiff, appealed against the decree in so far as it affected him; but the judge, remarking that he could only be relieved at the expense of his co-defendants, and that he had not made them respondents, declared the appeal informal, and refused to hear him.

Held, that this was wrong, as the only question the judge could decide was, whether the appellant was liable for the amount awarded against him or not. This was clearly wrong. The plaintiff had not appealed, and the appellate court could not consequently have thrown any portion of the special appellant's burden on the other defendants. Its duty was confined to a determination of the question whether the appellant was justly liable for the amount decreed against him or not. The case will therefore be remanded, in order that the judge may take up the appeal of the special appellant, and dispose of it with reference to these remarks.

THE 26TH APRIL 1859.

H. T. RAIKES and A. SCONCE, ESQS., Judges, and H. V. BAYLEY, ESQ.,
Officiating Judge.

Case No. 303 of 1857.

*Regular Appeal from the decision of Mr. J. Weston, Principal
Sudder Ameen of Tirhoot, dated 5th July 1856.*

Bechoo Chowdhree, (Plaintiff,) *Appellant,*
versus

Mussumat Luchmee Chowdhraïn and Purbuttee Chowdhraïn, (De-
fendants,) *Respondents.*

*Baboo Ramapersad Roy and Jugudanund Mookerjee, for Ap-
pellant.*

*Baboo Shumbhoonath Pundit and Sreenath Dass, for Respond-
ents.*

Suit laid at Rupees 9289-12.

THE decree of the lower court states that this suit was brought
“to decide a title and for possession, with registration of names in
the district register in lieu of defendants, in respect of 8 annas in
the entire talook Roharah, and of 8 annas 1 pie in mouzah Muddee,
and to establish a right to recover rs. 25-14-6-10 malikana in cash from
the treasury on account of 7½ annas of 16 annas of mouzah Sonah
Bheet, pergunnah Ahis, comprising the estate of Beechook Chow-
dhree, deceased.”

The persons in possession are the widow and daughter of Bee-
chook Chowdhree: and the plaintiff avers that he, as cousin of Bee-
chook, was in joint possession of the property at the time of Bee-
chook's decease; that, consequently, his widow and female relatives
do not succeed to joint property; and also that they are excluded by
the custom of their family.

The principal sudder ameen held that plaintiff had nothing but
the evidence of some witnesses to prove his joint possession; and
that such proof could not be relied upon, as had plaintiff's aver-
ments been true, there must have been documentary evidence to
support it; that, on the other hand, the defendants had produced
several zemindaree papers and official documents and receipts of
revenue, which showed that Beechook had collected the rents of his
share *separately*, and had had *distinct* money transactions, and
paid his own share of the Government revenue; and on these
grounds dismissed the plaintiff's claim.

In appeal the pleader has been able to make out no better case
for his client than appears to have been made out in the court
below.

He cannot show that his client at any time held any thing in
common with the deceased; and on the point of family custom there

Order of low-
er court upheld,
which confirm-
ed widow and
daughter of de-
ceased in posses-
sion of his prop-
erty, lawfully
inherited by
them, against a
claim which was
in no way sub-
stantiated of a
cousin of de-
ceased, who
averred joint
possession with
him during his
life-time, and
the inability by
law and family
custom of the
wife and daugh-
ter to inherit
joint property.

is only a petition of Beechook's, in which such custom is alluded to as justifying a demand made by him and the plaintiff for possession and mutation of names on the death of another cousin. But we cannot allow an evidently self-interested statement like this to prevail against facts, which show satisfactorily that Beechook held his own share distinct and separate; and that, consequently, the widow and daughter have a *prima facie* right to inherit it. Proof of the koolachar pleaded is entirely wanting.

We confirm the decision, with costs.

THE 26TH APRIL 1859.

H. T. RAikes and A. SCONCE, ESQS., Judges, and H. V. BAYLEY, ESQ.,
Officiating Judge.

Case No. 756 of 1857.

Regular Appeal from the decision of Moulvee Mahomed Nazim Khan, Principal Sudder Ameen of Dacca, dated 4th May 1857.

Sagurmonee Chowdhraïn and others, (Plaintiffs,) *Appellants,*
versus

Jugobundoo Bose and others, (Defendants,) *Respondents.*

Baboos Ramapersad Roy and Kishenkishore Ghose, for Appellants.

Baboo Shumbhoonath Pundit and Moonsee Ameer Alee, for Respondents.

Suit laid at Rupees 6781-12a-4p.

The Court decided under the circumstances set forth, that the case was of a value, such that the appeal from the order of the principal sudder ameen must be referred first to the zillah judge.

Order on costs accordingly.

ON this case being called up for hearing, an objection was taken by Baboo Shumbhoonath Pundit for respondents, that the appeal could not be heard in this Court, inasmuch as, the value of the suit having been determined by the principal sudder ameen to be under rs. 5000, the appeal by law lay to the zillah judge. It appears that in the plaint the land sued for, estimated at the market value of rs. 25 a kanee, gave a total valuation of rs. 6781; that the defendants in their answer urged that the suit had been largely overvalued, with the view of carrying the appeal to the Sudder Court instead of the zillah judge; and that the principal sudder ameen, on enquiring into this plea, held the proper value of the subject of the suit to be rs. 3390, that is, half the value assumed in the plaint. The principal sudder ameen, having made this order on the question of valuation, properly considered that the jurisdiction of trying the suit in the first instance rested with himself, and proceeded to dispose of, and eventually dismissed the case on its merits.

Under these circumstances plaintiffs brought their appeal to this Court ; but by the principal sudder ameen the value of the subject of the suit has been determined to be only rs. 3390 ; and it appears to us that we must accept that valuation as if the same amount had been originally set forth by appellants in their plaint. No doubt, we can conceive a case in which the principal sudder ameen may have erred in his calculation, or at all events in which the grounds of the principal sudder ameen's finding might be disputable, and might be questioned in appeal. But the present appellants took no exception to the decision of the principal sudder ameen upon this point ; they accepted the conclusion of the principal sudder ameen, but, nevertheless, they have brought their appeal here as if the original valuation had been definitely accepted. It is true that, on the objection to the admissibility of the appeal being raised before us, Baboo Ramapersad Roy applied for the permission of the Court, under Section II. Act XV. of 1853, to add an objection to the principal sudder ameen's finding upon the matter of valuation to the grounds of appeal previously set forth ; but, looking upon this as a mere after-thought, that might possibly afford the appellants an opportunity of bringing their case to a hearing in this Court, and not as embodying their objection to a finding with which they were substantially dissatisfied, we thought the application should be refused. In fact, not only as determining the course of appellate jurisdiction, but as affecting the liabilities of plaintiffs in the matter of costs, they had a substantial interest in questioning the decision of the lower court upon the point of valuation. If we conceive judgment to go for plaintiffs on the merits, they would still be liable to defendants for exposing them to costs in maintaining pleadings largely in excess of the sum which the proper valuation of the suit warranted. But appellants in their appeal accepted the conclusion of the principal sudder ameen upon the matter in question ; and as the point is in itself wholly foreign to the grounds of appeal which they did raise, we think the application to enlarge the grounds of appeal should be refused.

We must, accordingly, deal with the case as with a suit in which, as provided by Clause 2, Section XXVIII. Regulation V. of 1831, "an appeal shall lie to the zillah judge." We, therefore, strike the case off the file of this Court, and transfer the appeal to the zillah judge. Respondents' costs in appeal here, to the amount of one-fourth on the full value of the appeal as preferred, will be charged to appellants, and also, whatever may be the issue of the appeal, the excess value of the appeal stamp over and above the true value cannot fall on defendants, respondents.

THE 26TH APRIL 1859.

H. T. RAIKES and A. SCONCE, ESQS., Judges, and H. V. BAYLEY, Esq.,
Officiating Judge.

*Regular Appeals from the decision of Moulvee Wuheesooden
Khan Bahadoor, Principal Sudder Ameen of Shahabad, dated
12th December 1856.*

Case No. 245 of 1857.

Mussumat Fatimoonissa Begum and Itrutoonissa Begum,
(Defendants,) *Appellants,*
versus

Gyanee Ram and others, (Plaintiffs,) *Respondents.*

Baboo Ramapersad Roy and Moonshee Ameer Alee, for Appel-
lants.

Baboos Kishenkishore Ghose and Gobindchunder Mookerjee, for
Respondents.

Case No. 246 of 1857.

Sheik Lall Mahomed, (one of the Defendants,) *Appellant,*
versus

Gyanee Ram and others, (Plaintiffs,) *Respondents.*

Case No. 247 of 1857.

Golab Lall, (one of the Defendants,) *Appellant,*
versus

Gyanee Ram and others, (Plaintiffs,) *Respondents.*

Case No. 248 of 1857.

Bissessur Lall, (one of the Defendants,) *Appellant,*
versus

Gyanee Ram and others, (Plaintiffs,) *Respondents.*

Case No. 249 of 1857.

Hunooman Oopadhya, (one of the Defendants,) *Appellant,*
versus

Gyanee Ram and others, (Plaintiffs,) *Respondents.*

Moonshee Ameer Alee, for Appellants in these four cases.

Respondents' Vakeels, as in Case No. 245.

Held, that,
as a general
rule, a party
suing for fore-
closure and pos-
session, is bound
to give an ac-
count of his re-
ceipts, and to
prove them, be-
fore a declara-
tion of his right

SUIT for possession of mouzah Bondah and Chutter, with mesne
profits, laid at rs. 8479-11-5.

The plaint alleges that one Khadim Hossein, on the 30th July 1834,
executed a deed of sale for the above village, and at the same time
gave a receipt for the consideration, viz. rs. 3000 ; that these deeds
were duly signed, and sealed, and registered ; and that Khadim
Hossein received the purchase money in full. The plaint proceeds
to state that there was a separate covenant to the effect that, if the

vendor repaid the purchase money by the 30th Bhadoor 1246, to possession as under a sale the purchaser should cancel the deed of sale, and return it to the become absolute. But as the vendor; that a *teeka* lease of this village was given from 1242 to 1256, at a jumma of rs. 275, to secure the interest; that Khadim Hossein borrowed a further sum of rs. 2700 from plaintiff, and the objection was not taken below, nor the averment there made of the plaintiff's having repaid himself from the profits, the objection was overruled. It is added that a renewed *teeka* lease to Golab Rai, at a jumma of rs. 354, from 1247 to 1257, was given to plaintiffs' ancestor to secure the interest, and an order by the lessor for the lessee to take that sum on this account. The plaint then concludes by averring that, the money not having been paid when due, steps for foreclosure were taken on the 7th January 1851, and by detailing the rights of the several plaintiffs as heirs and co-sharers, and, lastly, repudiates any jagheer sunnuds which might be pleaded by some of the defendants sued.

Defendant, Mukbool Fatima, widow of Khadim Hossein, denies any demand of repayment, or notice before recourse to foreclosure. She pleads that the *ikrar* on which the application to foreclose was based was held invalid by the judge on the 28th January 1854; that the deed of sale and *ikrar* were both collusive, and Khadim Hossein's seal obtained and affixed, because that seal was in the hands of his dewan, Mohee Dass, and was used without authority; that no mesne profits could be demanded, as plaintiffs were in possession and had been so all along; and that the plaintiffs had not alleged dispossession in the plaint or in the proceedings to foreclose.

The answer of Mussumat Fatimoonissa is essentially to the same effect as the above.

The answers of Mokund Lall, Bissessur Lall, and Hunooman Oopadhya, alleged jagheerdars, rely on the validity of their sunnuds from Khadim Hossein, and on their possession under Act IV. of 1840.

Lall Mahomed, defendant, takes substantially the same plea as the above jagheerdars, adding that illness had prevented him from suing to set aside a summary award for rent obtained by plaintiffs against a ryot, in which case this defendant had appeared as objector.

The principal sudder ameen overruled some objections as to the inadequacy of the stamp on plaintiffs' alleged deed of sale and *ikrar*, and as to want of precision in the plaint; and was of opinion on the merits that the deed of sale and *ikrar* were good and valid; that due notice of the proceedings to foreclose had been given; that the money was not deposited; and that the sale had thus become absolute. The principal sudder ameen went on the registration of the deeds, on the fact that after such publication

the vendor made no objection during his life ; and that his widow, Mukhool Fatima, had, in a case under Act IV. of 1840, pleaded that rs. 5000, on account of this very mortgage, now denied, had been repaid in 1249 F. The principal sudder ameen also referred to a plea taken by defendant, that plaintiffs had, when in possession, appropriated rs. 2070 worth of timber, and should account for this, and all receipts, and observed that plea to be totally at variance with that now urged of the non-existence of a mortgage at all. The principal sudder ameen considered the teeka to Golab Rai good from his proved possession to 1257 F. He deemed the conditional sale proved further from the admission of it by the vendor in his petition for registration on the 7th September 1834 ; and concluded by giving his opinion that these facts and probabilities outweighed in his mind any amount of oral evidence adduced to the contrary.

The principal sudder ameen thus decreed plaintiffs' suit, exempting the jagheerdar defendants from costs except their own, and ruling that the plaintiffs' rights as against them could not be tried in this suit.

Defendants Fatimoonissa and Itrutoonissa, daughters of Khadim Hossein, appeal from this decision on its general merits, and on the special ground that plaintiffs should have filed and proved their accounts of receipts before the principal sudder ameen could hold the sale absolute. The four jagheerdars, defendants, appeal for their own costs, on the ground that the principal sudder ameen, having held them exempt from all liability for plaintiffs' suit, should have held them exempt from all costs.

JUDGMENT.

We are of opinion that, as a general rule, a party suing for foreclosure and possession is bound to give an account of his receipts and to prove them, before a declaration of his right to possession, and transfer of possession, as under a sale become absolute, can follow. But in this case this objection was not taken below ; nor was the averment of the plaintiffs having repaid themselves from the profits raised in the answers. We, therefore, do not think it open to our consideration at this stage of appeal.

Then as to whether the deed of sale and ikrar are valid, we have to remark that appellants have not shown us anything to justify our rejection of the principal sudder ameen's finding in favor of their validity. The registry of the deeds and their publication without objection by the vendor are not refuted by the appellants. It may be the case that Khadim Hossein's dewan, Mohee Dass, had command of his seal ; but we are not shown in regard to this case, any proof that these deeds were executed and registry made solely by his collusion, and not by the act and consent of Khadim Hossein

himself. It has been urged that Khadim Hossein's petition of the 7th September 1834 for registration of names was not given personally; that, although he was sent for by the collector, he never appeared in person; and that the registration case was finally struck off in consequence. This fact, however, cannot be taken as proof that he did not give or authorise a petition. It has been also pleaded that Mukbool Fatima's allegation of the re-payment of rs. 5000 on account of the mortgage and consequent admission of that mortgage, cannot bind appellants, who were then minors. We do not find it necessary to say on this occasion whether such an allegation alone would or would not bind appellants, for the principal sudder ameen has only treated the circumstance as one of the links in the chain of evidence by which he considers the plaintiffs' deeds proved.

The appellants not having shown us any proof in refutation of that relied on by the principal sudder ameen in favor of plaintiffs' case, we dismiss the appeal of Fatimoonissa and Itrutoonissa, with costs.

In respect to the appeals of the four jageerdars for their costs, we are of opinion that, as the principal sudder ameen held that their title could not be questioned by this suit of plaintiffs, and as they were exempted from all liability to plaintiffs, so also they should have been exempted from all costs.

We decree their appeals.

THE 27TH APRIL 1859.

C. B. TREVOR, ESQ., Judge, and E. A. SAMUELLS and G. LOCH, ESQS.,
Officiating Judges.

Case No. 580 of 1858.

Special Appeal from the decision of Mr. E. S. Pearson, Additional Judge of Dacca, dated 30th March 1858, reversing a decree of Moulvee Mahomed Nazim Khan, Principal Sudder Ameen of that district, dated 3rd December 1856.

Anundmohun Pal Chowdhree and others, (some of the Defendants),
Appellants,
versus

Sheochunder Pal and others, (Plaintiffs,) and Mudunmohun Roy
and others, (Defendants,) *Respondents.*

The Advocate General and Baboos Ramapersad Roy, Kishenkishore Ghose, and Unookoolchunder Mookerjee, for Appellants.
Baboo Shumbhoonath Pundit and Mr. R. T. Allan, for Sheochunder Pal and Doorgapersad Pal, Respondents.

THIS case was admitted to special appeal on the 15th September 1858, under the following certificate recorded by Messrs. C. B. Trevor and H. V. Bayley.

Held, in accordance with the principle laid down by the Court in

the case of Mah-
 arajah Koowur
 Kerut Singh
 versus Mus-
 sumat Ranees
 Sreemuttee, that
 anything which
 has been deter-
 mined by order
 in execution in
 a former suit,
 and which was
 necessarily to be
 determined as
 being involved
 in the subject
 matter of the
 suit, and as
 being essential
 to any opera-
 tive decree being
 passed upon it,
 must be held
 to be finally dis-
 posed of by the
 order, and, con-
 sequently, with-
 in the terms
 of Construction
 1129.

"Plaintiffs sued for possession of two 4-anna shares of 3d.-2k.-17g.-2c.-2k. mal and lakhiraj, belonging to various talooks, possession of which had been granted to defendants in execution in two suits which they had previously brought for two 4-anna shares of talook Sobharam.

"The defendants pleaded that the land now sued for had been in execution awarded to them as covered by their decrees; that these orders had been confirmed up to the Sudder Court; and that the plaintiffs' present claim could not stand.

"The lower court dismissed plaintiffs' claim. On appeal, the judge reversed the order of the lower court, and decreed it.

"Defendants now appeal specially, urging that, though the plead-
 ing does not plead explicitly upon Construction 1129, or a plea in
 bar, yet such a plea is raised by the facts pleaded by them, and,
 consequently, should have been entered as an issue in the proceeding
 of the court laying down the issues in the case; and, second, that the
 judge has in effect laid the burden of proof on the defendants,
 which is erroneous.

"After hearing the advocate general on the part of special appel-
 lants, and Mr. Allan on the other side, we admit this special appeal
 to try the following points:

"1st. Do the facts stated in the pleadings of special appellants
 raise the plea of *res adjudicata* or not?

"2nd. If they do, then can this Court, in special appeal, notice
 a plea of jurisdiction not taken up below?

"3rd. If it can, then do the facts set forth in the pleadings of
 special appellants fall within the principle of Construction 1129,
 when correctly interpreted?

"4th. Has not the judge in effect thrown the burden of proof
 incorrectly on defendants, and should not the case, consequently,
 be remanded for re-investigation? This point will only arise in case
 the other points are answered in the negative."

JUDGMENT.

The plaintiffs in this case allege that the ancestors of the defend-
 ants, who were co-sharers with plaintiffs' ancestors in talook Sobha-
 ram, obtained at different times two decrees against them, each for a
 4-anna share of the said talook; that, in execution of those decrees,
 the different defendants at different times dispossessed them of cer-
 tain lands, consisting partly of the lakhiraj lands of talook Sobharam,
 to which the then plaintiffs were not entitled, and partly of the
 lands of separate and independent talooks not included in that suit;
 that having ineffectually, in execution, attempted to urge their rights,
 and the lands having been given to the then plaintiffs, they now bring
 the present suit for possession of the same, with mesne profits.

The defendants, after pleading that the suit is not maintainable,
 inasmuch as in execution of a suit between the plaintiffs and
 the special appeal dismissed, with costs.

themselves, the lands were determined to be the mal lands of talook Sobharam, proceeded then to urge that the decision come to in execution was correct, and that plaintiffs' suit should be dismissed.

The lower court dismissed plaintiffs' claim, but the judge, on appeal, relying on the evidence brought forward by the plaintiffs, gave them a decree according to the prayer of their plaint.

We think it clear that the defendants in their answer sufficiently raise the plea of *res adjudicata*, and, consequently, that this Court can notice the point in special appeal. The main contention then is on the third point, on which the special appeal has been admitted, *viz.* do the facts set forth in the pleadings bring the present case within the principle of Construction No. 1129, correctly interpreted?

It will be observed, from the abstract of the pleadings above given, that the suits brought by the defendants then in this case against the plaintiffs were for a share of talook Sobharam without specification of lands or boundaries; and it appears that in execution an ameen proceeded into the mofussil to place the then plaintiffs in possession of the share of the talook adjudged to them. Disputes arose in execution regarding the land now sued for; the defendants in those cases, the plaintiffs in the present, alleging that this land did not belong to the mal lands of talook Sobharam, but belonged partly to the lakhiraj lands of talook Sobharam, in which the plaintiffs had no share, and partly to other talooks not then in suit. In execution, the objection of the then defendants was summarily rejected by the lower and by this Court, and the present suit has originated out of that rejection.

It has been contended by the learned advocate general, that this suit falls within the principle on which Construction 1129 was declared by this Court, in the case of Maharajah* Koowur Kerut Singh *versus* Mussumat Ranees Sremuttee, to rest, *viz.* that any thing which has been determined by order in execution in a former suit, and which was necessarily to be determined as being involved in the subject matter of the suit, and as being essential to any operative decree being passed upon it, must be held to be finally disposed of by the order.

Now, on turning to the case above cited, we find that the plaintiff sued for possession of certain villages, uslee and dakhilee, without specification of the names or number of the dakhilee villages. In execution, the plaintiff applied for possession of seven dakhilee villages. The judge admitted the plaintiff's claim, but the judges of this Court, who had passed the original decree upon appeal, reversed the judge's order, confining the decree to one dakhilee village. The plaintiff then brought a fresh suit for the six villages

* Sudder Dewanny Decisions of June 1853, pages 521—525.

which had been held to be not the dakhilee of Jyenuggur, but nizamat villages of a separate estate, talook Sookee, belonging to the defendant. This Court then held, after enunciating the principle above cited, "that the first decision was in favor of plaintiff, and he did not appeal against it as being insufficient by reason of its not containing an award regarding the exact number and names of the villages to be made over to him. He was content to bring that matter forward in execution, and to have it decided in that more summary mode of procedure. The decision was indispensable to the giving due effect to the decree, and the Court, having omitted, from whatever cause, to notice the point in the regular enquiry before passing a judgment, was bound to consider and settle it as it arose in execution. The plaintiff, having been assenting to such a disposal of the controversy respecting the villages of which he was to obtain possession, cannot be allowed to commence a new litigation by a fresh regular action, because the determination was against him."

With this ruling we entirely concur; and we think, with the judges deciding that case, that certainty in legal procedure requires that, in such cases, the plaintiff shall be bound by the course of action which he has chosen to adopt. But the circumstances of this case are very different from those above detailed. Here the plaintiffs were the defendants in the first suit. That suit was only for a share of the talook without specification of lands. The proceedings in execution were taken on the motion of the plaintiffs, the decree-holders, and they could not stay them; and though, by an accident, the objectors happened to be the defendants in the suit, they objected as owners of property other than that in suit, and, therefore, as distinct persons in law.

Looking to these facts, we think that the principle of Construction 1129, as enunciated by the Court in Maharajah Koowur Kerut Singh's case, will not apply to the present case; and we are of opinion generally that, when in execution of a decree for a share of a property, the defendant in that suit, or any third party, claims certain lands taken in execution as belonging to property other than that decreed, on such objection being rejected summarily, it is competent to such objector to institute a fresh suit for the lands, on the supposition wrongly included in the suit to which, in the character in which he claims, he was not a party.

It is true, as remarked by the learned advocate general, that the fact of the defendant's being the objector is, *prima facie*, a suspicious fact; but such suspicion does not exist in this present case, for the judge has determined that the objectors, the plaintiffs in this suit, are entitled to the lands claimed by them as separate and distinct from those decreed to the defendants in this suit, and the presumption, of course, is, that this decision is correct.

Such being our opinion as to the principle of Construction 1129, when applied to the particular facts before us, it is unnecessary for us to discuss it with reference to a state of facts which is not now before the Court.

Under the view of the case expressed above, we dismiss the special appeal, with costs.

THE 27TH APRIL 1859.

C.B. TREVOR, Esq., Judge, and E. A. SAMUELLS and G. LOCH, Esqs.,
Officiating Judges.

Case No. 795 of 1858.

Special Appeal from the decision of Syud Ahmud Buksh Khan, Principal Sudder Ameen of Mymensing, dated 20th January 1858, modifying a decree of Baboo Gungakanth Bidyalunkar, Moonsiff of Madargunge, dated 17th August 1857.

Musst. Huromonee Debea and Hurochunder Surma, (Plaintiffs),
Appellants,
versus

Kishen Mungul and another, (Defendants,) *Respondents.*

Baboo Kishensukha Mookerjee, for Appellant, Ex-parte.

THIS case was admitted to special appeal on the 29th December 1858, under the following certificate recorded by Messrs. J. H. Patton and H. V. Bayley.

"Plaintiffs sued defendants for a bond debt, rs. 125, with interest, or a total of rs. 235. The defendants pleaded that the debt had been discharged from the profits of a farming lease held by plaintiffs from defendants. The moonsiff found the farming lease to be proved, and that rs. 14-4 per annum had been realised from it from 19th Maugh 1254 to Jeyt 1262. The moonsiff also held that a *dakhila* for rs. 12, filed by the defendants, was not proved. He considered the accruing interest to be rs. 15 per annum, and giving defendants credit, in payment of interest, of rs. 14-4 per annum for the farming profits, he gave plaintiffs a decree for rs. 104-4. On appeal to the principal sudder ameen, he concurred with the moonsiff in respect to the non-proof of the *dakhila* for rs. 12, but held the moonsiff wrong in crediting the farming profits to *interest*, and that he should have done so to principal.

"Plaintiffs appeal specially, urging that the moonsiff's proceeding, in first crediting these profits in payment of interest, was correct.

"We admit the special appeal, to try whether the decision of the principal sudder ameen is not contrary to the practice and precedents of this Court."

Held that, in adjusting an account on a bond, the course adopted by the moonsiff, in crediting the amount of profits from the mortgaged property first to the liquidation of the interest, was correct.

JUDGMENT.

We think that the course adopted by the moonsiff, in crediting the amount of profits first to the reduction of the interest on the debt, was the proper method of adjusting the accounts. We, therefore, reverse the decision of the principal sudder ameen, and decree the appeal, with costs.

THE 27TH APRIL 1859.

C. B. TREVOR, Esq., Judge, and E. A. SAMUELLS and G. LOCH, Esqs.,
Officiating Judges.

Case No. 307 of 1858.

Special Appeal from the decision, of Mr. W. S. Seton-Karr, Officiating Judge of Jessore, dated 1st December 1857, affirming a decree of Baboo Anundchunder Banerjee, Sudder Ameen of that district, dated 19th June 1857.

Joychunder Ghose, (one of the Defendants,) Appellant,

versus

Mudhoosoodun Bose, (Plaintiff,) and Mohessuree Dasse, mother and guardian of Kaleenath Dass and others, (Defendant,) Respondents.

Baboos Ramapersad Roy and Sreenath Dass, for Appellant.

Baboos Kishenkishore Ghose and Taruknath Sein, for Mudhoosoodun Bose, Respondent.

Held that, on a plea in bar being overruled, and the case being remanded to be decided on its merits, it is not competent, on the merits having been entered into, and the case coming up in appeal, for the party originally pleading the plea in bar, who did not appeal against the order rejecting it, to re-open that point. Not having appealed against the order at the time, and having allowed the case to be decided on its merits, he must be considered to have waived that plea.

THIS case was admitted to special appeal on the 8th May 1858, under the following certificate recorded by Messrs. A. Sconce and J. S. Torrens.

"This suit was instituted by Mudhoosoodun Bose to recover 40 beegahs, in two portions, of 27 and 13 beegahs each, on the title of a sale effected in his favor on the 22nd Pous 1248, by Soorujnath Moonshee and Kripamoyee. In the decision of the judge this claim is supposed to have been simply met, by the answer filed by defendant, petitioner, that the same land had been sold to him by the same parties on the 25th Jeyt 1248, that is, several months previous to plaintiff's purchase. Upon the facts, so far as the issue before the judge turned upon the preference to be given to the one kubala or the other, no question is now taken. The judge has decided for the plaintiff's purchase, and that finding must be accepted. But petitioner shows that once before the same case had gone up in appeal to the principal sudder ameen, upon the point whether plaintiff's claim to the first patch of 27 beegahs should not hold to be inadmissible, because of the plaintiff's vendors' right to the land having been, in a former case, decided by the judge on the 11th January 1848, disallowed. In that old case

Special appeal rejected, with costs.

Premchand Kurnukar, as lessee of Soorujnath and Kripamoyee, sued for possession of the land, making his vendors defendants, as well as the principal defendant Soorujnarain Bose and Hureenarain. On that occasion the land was determined not to belong to the plaintiff Premchand or his vendor, but to Hureenarain, and to the village of Assanagur. Accordingly, following that older decision, the sudder ameen, on the first trial of this suit, held that the previous definite determination of the land belonging to Hureenarain in Assanagur and not to Soorujnath and Kripamoyee in Dongha Ghattah, precluded the entertainment of the claim of plaintiff, as representative of Soorujnath and Kripamoyee, to recover the same land. On appeal, however, the principal sudder ameen, on the 23rd August 1855, considering that the suit preferred by the ryot of the vendor did not prejudice the rights of the latter, remanded the case for decision upon the merits.

"This point is now brought up in special appeal. It is contended that, as plaintiff's vendors were parties to Premchand's suit, and in their presence their right to lease the land was disallowed, plaintiff is incompetent to re-open the same question of right for the first parcel of 27 beegahs.

"This plea cannot apply to the petitioner's right to the land, in so far as it arose from the same vendors. But it is shown that petitioner relied not only or mainly on the sale by Soorujnath and Kripamoyee, but on the issue of the first suit, and on his subsequent acquisition of the first parcel from third parties. The exact form of the answer made by petitioner is not now before us. Nor is it shown that petitioner in his last appeal relied on any other purchase than that made by the plaintiff's vendors; but on the other hand it is urged that the decision of the principal sudder ameen, as to the effect of the first suit upon the present contest, prevented his raising again an issue connected therewith. The question involves some difficulty, and we admit the special appeal to try the point above given.

"A second point is submitted respecting plaintiff's right to sue, seeing that the deed of sale was drawn in Mohunchunder's name: but the sale to plaintiff is held proved, and, besides, Mohunchunder's wife and representative gave in a petition, supporting his claim. Upon this plea, therefore, we see no defect in the judgment of the lower court."

JUDGMENT.

On reverting to the record, we find that, in the answer filed by the defendant, petitioner, it is pleaded that, regarding the parcel containing the 27 beegahs of land claimed by the plaintiff, a previous suit had been instituted; that in that suit the vendors of the plaintiff in the present suit were parties, and in their presence

the right to the 27 beegahs of land now sued for was rejected; and that, consequently, the plaintiff cannot now raise the same point a second time, he being in law the same party with his vendors.

This objection was admitted by the first court, but overruled on appeal by the principal sudder ameen, who remanded the case for investigation on the merits. No special appeal was preferred against the rejection of a plea in bar, but the case was decided by the lower court on the merits, and both courts came to a decision in plaintiff's favor; and defendant has now attempted to re-open the plea in bar, which was overruled by the principal sudder ameen, when the case was before him in appeal.

We think that it is not competent to the defendant so to act, but that, as laid down by the Court in the case of Gopeenath Surma Chuckerbuttee, appellant, *versus* Kumullochun Aetch, Sudder Dewanny Decisions of 1857, pages 489—492, it was incumbent upon him, if objecting to the decision come to by the principal sudder ameen on the plea in bar, to have appealed specially. Not having done so, but having allowed the case to be decided on the merits, he must be considered to have waived that plea, and, consequently, is unable to raise it at the present time.

We do not mean to rule that any interlocutory order passed in a case must be appealed against; far otherwise: we only hold that when pleas in bar are rejected, and a case is remanded to be decided on the merits, any failure to appeal against that ruling, which allows the case to proceed, will be considered tantamount to a waiver of the plea.

Under this view we reject the special appeal, with costs.

THE 27TH APRIL 1859.

C. B. TREVOR, Esq., Judge, and E. A. SAMUELLS and G. LOCH, Esqs.,
Officiating Judges.

Case No. 134 of 1857.

*Regular Appeal from the decision of Roy Ramlochun Ghose,
Principal Sudder Ameen of Nuddea, dated 20th December 1856.*

Gholam Hossein Biswas, (Plaintiff,) *Appellant*,
versus

Ramguttay Biswas and others, (Defendants,) *Respondents*.

*Baboos Shumbhoonath Pundit, Kishenkishore Ghose, and Bung-
sheebuddun Mitter, for Appellant.*

Baboo Ramapersad Roy and Mr. R. T. Allan, for Respondents.

Suit valued at Rupees 6000.

Held, that, as the defendant had failed to obtain possession of one-third of the putnee called Dhee Bednah, CHUNDER HURREE PARAMANIK instituted the present suit to

alleged to have been conditionally sold to his father Doorgapersad by the defendant Ramguttee. During the progress of the suit, he sold his rights and interests in the property to Gholam Hossein, who has been admitted as a co-plaintiff. The circumstances under which the suit is brought are as follows.

Bhugeruth Biswas, Shibpersad Biswas, and Rughoonath Biswas were three brothers, joint proprietors of the putnee Dhee Bednah, living in commensality, and carrying on business with their joint funds. Bhugeruth died, leaving a son, Ramguttee, who, having succeeded his father, borrowed the sum of rs. 3000 from Doorgapersad Paramanik, and executed a deed of conditional sale of his one-third of the putnee on 5th Bysakh 1246, corresponding with 17th April 1839. The period when the loan with interest was to be paid up expired on 30th Cheyt 1253, corresponding with 11th April 1847, and notice of foreclosure was issued on 27th Kartik 1254, corresponding with the 12th November 1847; and the present suit, to obtain possession under the terms of the deed of sale, was instituted on the 15th September 1852, corresponding with 1st Assin 1259. After issue of notice of foreclosure, the other partners in the estate having, as alleged by the plaintiff, prepared a fraudulent deed of partition, in which the share of Ramguttee was recorded as only 2 annas 10 gundas, filed a petition of objection to the plaintiff's claim; and the object of the present suit is to set aside that deed of partition, executed on purpose to defraud the plaintiff, and to obtain possession of one-third of the putnee belonging to Ramguttee, with mesne profits from the date of foreclosure.

Shibpersad and other partners denied that Ramguttee had originally any share in the putnee. They and the defendant Ishwarchunder allege that, after the death of Bhugeruth and Rughoonath Biswas, and while Shibpersad was on a pilgrimage to Benares, the defendant Ishwarchunder, son of Shibpersad, purchased the putnee from Goluk Roy out of his own private self-acquired funds, and held sole possession; that, in order to settle disputes which arose between him and his relatives, he, on 11th Pous 1253, corresponding with 25th December 1846, executed a deed of partition, under which he assigned 3 annas of the property to himself, 2½ annas to Ramguttee, and other shares to other members of the family; that, at the time the deed of conditional sale is said to have been executed, Ramguttee was a minor and had no defined share in the putnee, and, consequently, that deed was a forgery, prepared by Suroopchunder Sircar of Sibnibas, with whom defendants were at enmity.

The defendant Ramguttee repudiated the deed in his answer, but on the 14th February 1854 filed a petition, acknowledging that he had executed the deed and that the transaction was *bonâ fide*.

prove the special plea, that the property in dispute had been purchased from his own means, and as the deed of partition among the members of the family was fraudulent, the property must be considered as part of the ancestral estate, and liable to follow the incidents of such property; and as the deed of conditional sale was satisfactorily proved, the Court, in reversal of the decision of the principal sudder ameen, decreed possession to the appellant.

He had previously applied to the Court to have the plaintiff Chunder Hurree Paramanik examined, and a summons was issued on 31st January, but in his subsequent petition he prayed that the service of the summons might be stayed. On the following day plaintiff filed a petition, stating that he had sold his rights to Gholam Hossein, who acknowledged the purchase, and prayed that his name might be substituted for that of the plaintiff Chunder Hurree. The defendant Ishwarchunder then applied to have Chunder Hurree examined, and summons was issued on the 17th February 1854, and a subsequent proclamation requiring his attendance was issued on the 24th March following ; but he did not appear, and on the 27th May the acting principal sudder ameen decreed the rights and interests of Ramguttee, whatever they might be, in favor of Gholam Hossein.

Two appeals were preferred from this decision ; one by Gholam Hossein on account of the vagueness and incompleteness of the decree, and the other by Ishwarchunder Biswas on technical grounds. This last appeal was rejected. On the appeal of Gholam Hossein the Court held that the principal sudder ameen had altogether evaded the question which the pleadings raised before him. Whether Ramguttee had any and what interest in the property, whether he at the time of the mortgage was competent to mortgage it, and whether the mortgage was a *bond fide* transaction or not, were points which required the determination of the principal sudder ameen. And the case was remanded on 10th March 1856, directing him, after taking any further evidence that might be necessary, to pass an order, either dismissing the plaintiff's suit or giving him possession of a specific share of the property sued for. The principal sudder ameen has now dismissed the suit, on the grounds that there was no proof that the putnee was purchased from ancestral funds, or that Ramguttee had any share in it till the partition made by Ishwarchunder on 11th Pous 1253 ; and he held that the deed of conditional sale, alleged to have been executed by Ramguttee on 8th Bysakh 1246, was spurious, and that no credence was to be given to the statements of that individual regarding that transaction, as he had frequently contradicted himself.

An appeal has been preferred by the plaintiff from this decision. He urges that he has given such evidence as he could obtain of the joint proprietary possession of the putnee by Bhugeruth, Shibpersad, and Rughoonath, and that Ramguttee as heir of Rughoonath is entitled to a third ; that the terms used in the deed of partition itself, which has been set up to evade his claim, show that the defendants were an undivided Hindoo family, having all things in common, and it is for the defendant to show that the property was, as stated by them, not purchased from the ancestral funds, but by Ishwarchunder from his

own means. Appellant adds that execution of the deed of conditional sale is proved, and that the exception taken to the evidence of the attesting witnesses is without grounds.

On the other hand it is shown us that the putnee was taken in the name of Ishwarchunder Biswas though his father Shibpersad is still alive, and that plaintiff's witnesses admit that Ishwarchunder took the putnee from Goluk Roy, that he has possession of and filed the title deeds; that proceedings under Regulation VIII. of 1819 were taken out against him by the zemindar; that the farming leases of the putnee to Doorgachurn and Mr. Harris were taken and ran in his name as sole proprietor, and in suits to recover rents from the ryots his name was always made use of as the proprietor of the putnee, and that the deed of partition, the genuineness of which the plaintiff does not deny, shows that he was recognised by the rest of the family as sole proprietor of the putnee up to the date of the execution of that deed; that nothing has been advanced on the other side to show that there were any ancestral funds; and that Chunder Hurree, the original plaintiff, knowing that, if examined, he would have been obliged to disclose the real nature of the alleged transaction with Ramguttee, had avoided giving his evidence, substituting the present plaintiff, a man of straw, as the purchaser of his rights and interests.

While there can be no doubt that the defendants belong to an undivided Hindoo family, no proof, except the evidence of witnesses, has been given us that the putnee was the joint property of Bhugeruth, Rughoonath, and Shibpersad Biswas, or that it was in the family during the life-time of the two former. The putnee lease is dated 9th Magh 1242, and is in the name of Ishwarchunder Biswas, the son of Shibpersad, who is still alive; and all decrees, farming leases, receipts, &c., run in his name, and the title deeds are in his possession and were filed by him. The fact, however, of his having possession of these title deeds and of the other documents alluded to being in his name, is not conclusive proof that the putnee was the sole property of Ishwarchunder; for in undivided Hindoo families it frequently happens that property is purchased in the name of one or other of the members of the family indiscriminately, and the use of the individual's name gives him no special title to the property. It is of course impossible for a person in the plaintiff's position to prove that the putnee was purchased from ancestral funds; and as it is asserted by Ishwarchunder that he purchased it from his own funds, it remains with him to prove this special plea. Now the only evidence on this point laid before us, besides the testimony of certain witnesses, whose statements are of a very general nature, consists of a document called a deed of partition, dated 11th Pous 1253, which sets forth that Ishwarchunder is the sole proprietor of the putnee, and that he of his own

free will divided the same among the different members of the family, himself retaining one share ; that he was to retain possession of the whole estate till his death, &c. Now it may be remarked with regard to this document, that no satisfactory reason for its execution has been shown us. In the answer it is said to have been drawn up in order to settle family disputes ; but we have no evidence of the existence of such disputes, and the allegation appears to be a mere assertion easily made and got up for the purpose. If the property were self-acquired, it is singular that the owner should divide it among the members of the family, who had no claim to it. The document is rather of the nature of a will than of a gift, and it is not signed by Ishwarchunder, the donor, but by the parties for whose benefit the partition was made. The defendant Ishwarchunder has not attempted to show us that in 1242 he was carrying on a separate business with self-acquired funds, or what were the funds at his disposal when the putnee was taken in his name ; and it is not proved that either Bhugeruth or Rughoonath died before that date. However little the admission of the defendant Ramguttee is to be trusted, yet in his answer, which is adverse to the plaintiff and repudiates the deed of conditional sale, he describes his share of the property as 5-6-1-1, and relates how Surroopchunder Sircar negotiated with him and agreed to assist him in recovering the share of Ramguttee made over to him, 2a-6g-1c-1k. of the said property ; that this coming to the ears of Ishwarchunder he offered to settle with Ramguttee, and the deed of partition, dated 11th Pous 1253, was accordingly executed.

On a review of the evidence laid before us, we consider that the defendant Ishwarchunder has failed to prove his special plea, and, consequently, the putnee in dispute must be considered part of the ancestral property, in which, as admitted by his co-defendant, Ramguttee has a right to a third share ; and as no satisfactory reasons for questioning the validity of the deed of conditional sale, executed by Ramguttee in plaintiff's favor, have been assigned, we hold it to be a good and valid document, and think the deed of partition, bearing date 11th Pous 1253, pleaded by the defendant, to have been drawn up with the view of defeating the plaintiff in obtaining his just rights under the deed of conditional sale executed by Ramguttee. Under these circumstances we reverse the decision of the lower court, and decree the appeal, with costs.

THE 27TH APRIL 1859.

C. B. TREVOR, Esq., Judge, and E. A. SAMUELLS and G. LOCH, Esqs.,
Officiating Judges.

Regular Appeals from the decision of Mr. L. S. Jackson, Officiating Judge of Rajshahye, dated 14th May 1857.

Case No. 652 of 1857.

Collector of Rajshahye and others, (Defendants,) *Appellants,*
versus

Messrs. R. Watson and Co., (Plaintiffs,) *Respondents.*

Baboo Ramapersad Roy, for Appellants.

Mr. R. T. Allan, for Respondents.

Case No. 220 of 1858.

Messrs. R. Watson and Co., (Plaintiffs,) *Appellants,*
versus

Dost Mahomed Khan and others, (Defendants,) *Respondents.*

Mr. R. T. Allan and *Baboo Unookoolchunder Mookerjee*, for Appellants.

Baboo Ramapersad Roy, *Moonshee Ameer Alee*, and *Syud Murhumut Hossein*, for Respondents.

Suit valued at Rupees 83,231.

Mr. G. Loch.—Messrs. Watson and Co. sued to reverse the sale of the putnee Debee Hattee, pergunnah Govindpoor, and to obtain possession, with mesne profits, from the auction purchaser under Regulation VIII. of 1819. Before the suit could be heard it was necessary for the plaintiffs to prove their title to sue. For this purpose they filed several deeds of sale and other documents, and gave in a list of eighteen witnesses living in Calcutta, who they prayed might be examined under a commission addressed to the judge of the Small Cause Court, as provided by Act VII. of 1841.

The commission, dated 4th April 1856, returnable on the 24th idem, was accordingly issued, but the judge of the Small Cause Court returned the commission, with a certificate that the witnesses had not appeared. The 27th of April was fixed for the hearing of the case, but owing to press of business it could not then be taken up; and on the 28th idem the plaintiffs filed a petition for the re-issue of the commission, which petition was rejected, as the reasons assigned by plaintiffs' mooktear, for not producing the witnesses when the commission had been issued, were considered insufficient; and on the 14th May 1857 the case was dismissed. Plaintiffs had made the collector, Mr. Leycester, who conducted the sale of the putnee,

In a suit for reversal of a putnee sale, plaintiffs obtained a commission for the examination of witnesses in the Calcutta Small Cause Court, the time within which it was returnable being fixed with their own concurrence. They neither appeared in that court, however, nor made any attempt to procure the presence of their witnesses. The commission was, consequently, returned unexecuted. Held, that the judge

was right, under the circumstances, to decline to re-issue the commission.

The collector in this case was sued personally, but the Government appeared for him, and the judge in consequence refused the Government their costs. Held, that they were entitled to their costs, having a right to appear for their officer if they thought fit.

a party to the suit, and an answer, under the provisions of Regulation II. of 1841, was filed by Government, supporting the acts of their officer. The judge, when he dismissed the case, made plaintiff responsible for the costs of the defendants Dost Mahomed Khan and others, but refused to award costs in favor of Government, because the collector (for the time being) had appeared officially without reason, the person summoned being Mr. Leycester, who, being the collector, made the sale under Regulation VIII. of 1819, which plaintiff sued to annul.

Two appeals have been preferred from this decision, one by the plaintiff, and the other by Government. The plaintiffs urge that sufficient time was not allowed them to procure the attendance of their witnesses before the judges of the Small Cause Court ; that of the witnesses some had gone to England, some into the Mofussil, and the short time within which the commission was returnable was insufficient to enable them to find out where their witnesses were residing ; that the action of the Small Cause Court in issuing summonses to parties to be examined is slow, and it is with much difficulty such parties are brought to attend ; that examinations of such witnesses are made only on a Saturday, and, therefore, deducting the time taken for the transmission of the papers from Rajshahye, plaintiffs had only twelve or fourteen days to produce their witnesses, and in that time there were only two Saturdays on which their examinations could have been taken ; and plaintiffs pray that the case may be returned, they paying all the costs of appeal, and that the commission for the examination of their witnesses be re-issued, or, should the Court think it unadvisable to order the issue of the commission, that the judge be required to dispose of the case from the evidence already filed by them.

On reference to the record we find that the plaintiffs entered in their list of witnesses the names of eighteen persons, residents in Calcutta. Many of those were European merchants well known, and whose places of business are also notorious. The time appointed for the return of the commission was fixed with the consent of the pleaders ; and of the eighteen persons whose names appear in that commission, the counsel for the plaintiffs, appellants, could only mention one, who, at the time it was issued, was in England. Admitting that the commission did not reach Calcutta till the 8th or 9th of April, and that the period allowed for producing their witnesses was very limited, yet the plaintiffs, appellants, are unable to show that they took any steps for procuring the attendance of their witnesses before the commission was returnable.

No application was made within that interval to the judges of the Small Cause Court for the issue of subpoenas ; but after the day originally fixed for the hearing of the suit had passed, the plaintiffs applied for a re-issue of the commission, on the ground, as stated

by their mooktear, that he had been unable to find out where the witnesses were to be found. The judge shows, and it is admitted by the appellants, that before the suits can proceed the plaintiffs must establish their title to sue; and this title was to have been proved by the evidence of the witnesses resident in Calcutta, of whose places of abode plaintiffs could not have been ignorant. Had the appellants shown us that they had made any exertions to cause the attendance of their witnesses, the Court might have been disposed to accede to their request. As they entirely neglected this preliminary step in this case, without which the trial could not properly proceed, I think the judgment of the lower court should be affirmed. The decision of the judge, however, is not conclusive against the plaintiffs' claim, for it has only the effect of a nonsuit, and leaves the plaintiff an opportunity to bring a fresh suit, and, though it is questionable whether the judge had authority to pass such a qualified order, yet, as the opposite parties have acquiesced in it, I would refrain from interfering with it. I would dismiss the plaintiffs' appeal, with costs.

With regard to the appeal preferred by Government through the collector, though Mr. Leycester's name be mentioned among the defendants as personally sued, he was, in fact, sued in his official capacity as a servant of Government, and the Government defended the suit for him, and no objection was raised by the plaintiffs to this intervention on the part of Government. Under these circumstances I think the Government is entitled to receive its costs from the plaintiffs. I would therefore reverse so much of the decision of the lower court, and decree this appeal, with costs.

Mr. E. A. Samuells.—The plaintiffs in this case, Mr. R. Watson and others, were ijaradars and mooktears of Raja Ramchunder Roy Bahadoor. In one of these capacities they caused a putnee talook, belonging to Messrs. French, Hodges, and Co., to be brought to sale on the 16th November 1849, under the provisions of Regulation VIII. of 1819, and it was purchased at auction by the substantial defendant in this case, Dost Mahomed Khan Chowdhree. No attempt was made either by French, Hodges, and Co., or the official assignees into whose hands their property had passed, to challenge this sale; and on the 15th March 1851 the property of French, Hodges, and Co., in the Rajshahye district, in and out of possession, it is said, was sold to Mr. John Compton Abbott. This gentleman subsequently sold it to the plaintiffs, and they have lately come into court against the purchaser of the putnee and the then collector of Rajshahye, to have the sale of the putnee set aside, on the ground of certain irregularities in the sale proceedings, which they allege. Before they could proceed, however, it was necessary that they should prove themselves the representatives of French, Hodges, and Co. in respect of their right of action against

the putneedars in this particular case ; and for this purpose a commission was issued, at their request, to the judge of the Small Cause Court in Calcutta, to take the evidence of eighteen witnesses they named. The commission issued on the 4th of April, and was returned on the 24th unexecuted, in consequence of the plaintiffs having failed to attend or produce their witnesses. An application for the re-issue of the commission was rejected, and the case was dismissed, with an irregular intimation by the judge that his order should be no bar to the institution of another suit. The plaintiffs are unable in appeal to plead any reasonable excuse for their negligence. They cannot say the time allowed them was too short, for it was fixed with their own concurrence. They cannot plead delay or obstruction in the Small Cause Court, for they never went there. Nor can they allege they had any difficulty in finding their witnesses, for they can only mention one out of eighteen who was absent, and they never took out a subpoena or made any attempt in other ways to secure their attendance. Their case, therefore, has resolved itself into an appeal to the indulgence of the Court. The interests involved in the suit, it is said, are important, and the plaintiffs will be put to serious loss and inconvenience by the judge's order. The Court, however, must look to the rights of the defendants as well as to the interests of the plaintiffs, and must take care that it is not led to show indulgence to one party at the expense of the other, or to establish an inconvenient precedent. Now, in this case, although the appellants are willing to pay the costs already awarded against them, there can be no question that the re-issue of the commission will put the defendant to serious expense, and he accordingly objects to it strongly. It is certain that, if we remanded this case, we could not refuse to entertain similar applications for indulgence in cases where parties had been thrown out in the court below by their own negligence ; for it would be impossible, I think, looking on the one hand at the facts on which the plaintiffs base their action, and on the other at the circumstances connected with the commission, to imagine a case in which hardship could, with less justice, be pleaded as a ground for our interference. I therefore concur with Mr. Loch in rejecting this appeal, with costs.

In the appeal of the Government on the matter of costs there must be a decree, with costs. The Government have a clear right to appear for their officer if they think fit to do so, and are entitled to the costs, which he would have received had he appeared in person.

Mr. C. B. Trevor.—It seems that, within the time fixed, according to the consent of both parties, for the return of the commission for the examination of witnesses in Calcutta, no step was taken by the plaintiffs, either for procuring their attendance, or for pointing out their places of residence. In consequence of their neglect plaintiffs

have established no right to have the case remanded for re-investigation ; but, looking to the very short period that was allowed for the return of the original commission, to the applications which were immediately made for the issuing of a fresh commission, and also to the anomalous nature of the judge's order, which has simply the effect of a nonsuit, and has not therefore concluded the litigation, I would remand the case for re-investigation, on the condition that the plaintiffs pay the costs of the case up to the present date, and engage that within one month a new commission should be issued.

THE 27TH APRIL 1859.

H. T. RAIKES and A. SCONCE, ESQS., Judges, and H. V. BAYLEY, ESQ.,
Officiating Judge.

Case No. 314 of 1857.

Regular Appeal from the decision of Mirza Mahomed Siddiq Khan, Principal Sudder Ameen of Sarun, dated 24th January 1857.

Hurdial Ojha and another, (Plaintiffs,) *Appellants*,
versus

Baboo Bishendeonarain Singh and others, (Defendants,) *Respondents*.
Moulvee Syud Murhumut Hossein, for Appellants.
Moonshee Ameer Alee, for Respondents.

Suit laid at Rupees 7000.

THIS suit is brought to acquire possession of 350 beegahs of land, described as tola Indur Rae, by virtue of a purchased mortgage. Plaintiffs' statement is that, on the 28th January 1851, by a deed of bye-bil-wufa, Baboos Bishendeonarain and Kishendeonarain, for the sum of rs. 4800, mortgaged this tola to them ; that they paid down rs. 1800 in cash, and that, as the tola in question (said to be an adjunct to mouza Kowrea,) had been previously assigned in a zur-i-peshgee lease to Dhond Rae and Ajrawul Rae, for the sum of rs. 3000, they became answerable to the lessees for that sum ; that they had served notice of foreclosure on the mortgagors ; and that by non-redemption the mortgage had become absolute. Plaintiffs made various parties defendants in this cause, *first*, the mortgagors ; *second*, the lessees ; and, *third*, Belasee Koowur, and others described as auction purchasers.

Where, according to the averments of the plaintiffs, they purchased a property in mortgage from defendants, by a deed of bye-bil-wufa, and before payment of the whole price to defendants, they, plaintiffs, leased a part of the property, the extent of which was disputed under a zur-i-peshgee to A B, and defendants then, after service of notice of foreclosure, did not redeem their mortgage, and it was stated that, at some time before or after the said mortgage, O D had bought the property at an execution sale, there was not before the lower court proof that the mortgage and lease were fraudulent and collusive, nor therefore grounds for dismissing the suit without further enquiry.

The last named persons alone appeared to defend the suit, pleading that the mortgage to plaintiffs was fictitious and not real, and

vice of notice of foreclosure, did not redeem their mortgage, and it was stated that, at some time before or after the said mortgage, O D had bought the property at an execution sale, there was not before the lower court proof that the mortgage and lease were fraudulent and collusive, nor therefore grounds for dismissing the suit without further enquiry. Remanded for re-trial.

that the tola Indur Rae, which plaintiffs described as containing 350 beegahs, did not contain more than 75 beegahs.

The principal sudder ameen has dismissed the suit, because he considered the mortgage set up by plaintiffs to be collusive and fraudulent ; but whether we refer to the grounds of the principal sudder ameen's decision, or the answer of Belasee Koowur and others, or the explanation offered by their pleader in this Court, no sufficient cause appears to us to be shown for the dismissal of the action. The principal sudder ameen seemed to think that, because the asserted mortgage was nominal, it was therefore fraudulent, but we have no indication of the fraud which the transaction is assumed to cover and give effect to. Certainly there is no fraud intended upon the first lessees ; for plaintiffs distinctly recognise the obligation of paying off their advance. Nor, on the other hand, in the mere transfer from Bishendeonarain and Kishendeonarain of the land to plaintiffs, so long as they assent to the transaction, which assent, by their silence, the principal sudder ameen infers, does the question of fraud arise as against them. And, lastly, even on the part of the defendants who did appear, we have no statement of the injury or fraud that may possibly affect them from the recognition of the plaintiffs' claim. These defendants in no part of their answer say that the mortgagees had no rights of possession in tola Indur Rae ; and they do not show how the transfer of such rights as Bishendeonarain and Kishendeonarain possessed in the tola to plaintiffs would injure them or operate as a fraud upon them. On the contrary, so far as we understand the answer of the defendants, they admit the right of Bishendeonarain and Kishendeonarain to mortgage the tola, but object that, instead of 350 beegahs as asserted by plaintiffs, it contains only 75 beegahs. This issue as to quantity is intelligible enough ; but if it be that plaintiffs have overstated the extent of the tola, that is no reason why the question of right, in the absence of the assertion of any counter-right, should not be decided in plaintiffs' favor. The defendants Belasee Koowur and others are described as auction purchasers, meaning, as we understand, that they are purchasers at an execution sale : if they purchased before plaintiffs' mortgage, one sort of plea might arise ; if after, another sort of plea : but as to the date of their purchase, what property they purchased, or whose rights they purchased, we have no information whatever. In fact, as already intimated, their answer does not disclose any conflict of right between themselves and Bishendeonarain and Kishendeonarain, or their assignees the plaintiffs : and as the matter stands we have no room to presume the operation of fraud against them.

We are, therefore, under the necessity of returning this case to the principal sudder ameen for re-trial. He will distinctly understand

the ground of the defendants' opposition. If they assert any objection to the rights of the mortgagors in the disputed tola being transferred to plaintiffs, he should clearly record the grounds of that objection. Defendants do not in their answer say that the mortgagors' rights in tola Indur Rae had been sold to themselves; but if they do take this or any similar plea, the principal sudder ameen will consider it: if, on the other hand, the defendants do not assert any fraud upon themselves under cover of the mortgage, the principal sudder ameen will take up the issue raised as to the extent of the land comprised within the tola.

THE 27TH APRIL 1859.

C. B. TREVOR, ESQ., Judge, and E. A. SAMUELLS and G. LOCH, ESQS.,
Officiating Judges.

Case No. 216 of 1854.

*Regular Appeal from the decision of Baboo Lokenath Bose,
Principal Sudder Ameen of the 24-Pergunnahs, dated 16th
February 1854.*

Prannath Chowdhree and others, (Defendants,) *Appellants,*
versus

Kaleechurn Dutt, (Plaintiff,) *Respondent.*

Baboos Ramapersad Roy, Kishenkishore Ghose, and Poornochunder Roy, for Appellants.

Messrs. R. T. Allan and J. W. B. Money, and Baboos Shumbhoo-nath Pundit and Dwarkanath Mitter, for Respondents.

Suit valued at Rupees 9346-3a.-1g.

THIS suit was first before the Court on the 28th January 1857, and, on the appeal of the defendant Prannath Chowdhree, the Court held, for reasons detailed in the judgment, that the plaintiff had completely disproved his own case; it consequently reversed the decision of the court below in favor of the plaintiff, with costs.

Subsequently the plaintiff petitioned this Court for a review of its judgment, urging that this Court had misapprehended the object of the present suit; that that object was, accepting the

Held, that actual personal service under Section XXIV. Act XIX. of 1853 is not absolutely necessary, but that constructive personal service is sufficient to meet the requirements of the law above cited.

Held also that, as Prannath Chowdhree, the appellant, had been legally served with a summons under Section XXIV. Act XIX. of 1853, and had not appeared, and as the present appeal case is one calling for a strict exercise of the power vested in the Court by that law, the appeal of Prannath Chowdhree must be dismissed; and as to the 8 annas of the property now in his possession, the order of the lower court, declaring it liable to sale for the sum decreed to the plaintiff as due from Anundchunder Chuckerbuttee, must be affirmed. As plaintiff, respondent, does not require that the previous order in appeal, with reference to the other 8 annas in the possession of the other defendant should be disturbed, that order as to it is confirmed.

The costs of both courts, as between plaintiff and Prannath Chowdhree, will be borne by Prannath Chowdhree.

The costs of both courts, as between plaintiff and the other defendants, will, by agreement, be borne by each party respectively. The expense incurred by Government will also be borne by Prannath Chowdhree.

decision of the principal sudder ameen in 1843, as determining conclusively that Anundchunder Chuckerbuttee was, at the date of that decision, the responsible proprietor of the share of turuff Alumpore registered in his name, to obtain a declaration of the court, that certain subsequent transfers from Anundchunder to Koodrootoollah, and from Koodrootoollah to Prannath Chowdhree and others, were fraudulent and fictitious transfers ; and then, having removed these obstacles, to have the share of the property in Anundchunder's name, as still belonging to him, brought to sale in execution of the personal decree obtained by plaintiff against him for a sum of money paid into the collectorate, in order to save the estate from sale.

On the 25th July 1857 a review of judgment was admitted by the Court, for the purpose, to use the Court's words, of deciding whether the case ought not to be remanded, in order that the principal sudder ameen might try and pronounce a judgment on the true issue in the case, accepting it as a fact, which Prannath Chowdhree and Anundchunder Chuckerbuttee have admitted, and which has been established by a decree of court, and therefore cannot now be questioned, that the estate which it is sought to bring to sale was the estate of Anundchunder Chuckerbuttee.

The review so admitted came on for hearing on the 20th March 1858, and, in consequence of the very suspicious nature of the transactions between Anundchunder and Koodrootoollah, and Koodrootoollah and Prannath Chowdhree, dated severally the 20th January 1839 and the 28th September 1847, to get rid of which the present suit was instituted, the Court, on the 27th March last, considered it necessary, under the power vested in it by Section XXXV. of Act XIX. of 1853, to summon Prannath Chowdhree to attend as a witness, and to bring with him those deeds of transfer. Accordingly a subpoena *duces tecum* was issued, fixing the 10th April for Prannath Chowdhree's attendance. On the 17th April the nazir reported that he had not been able to serve the summons personally on the party whose presence had been required ; but that it had been affixed to his residence. On the 18th April the Court directed that a proclamation for Prannath Chowdhree's attendance on the 24th April 1858 should issue ; and on the 19th the nazir reported that the proclamation had been issued at Kassipore. On the 24th April the case came before the Court, and Baboo Kishenkishore Ghose then presented a petition from Prannath Chowdhree, praying that he might not be summoned : this petition was rejected. On the 23rd June witnesses to the serving of the usual processes having been heard, the Court directed the attachment of certain properties belonging to Prannath Chowdhree. The properties were attached by the judge of

the 24-Pergunnahs, and the 6th September was fixed as the date of sale. The sale was subsequently on the 26th August stayed until further orders; and on the 4th September Prannath Chowdhree petitioned, putting in at the same time a certificate of sickness. The certificate, however, turned out to be no certificate at all. It merely stated that he was suffering from diarrhoea, and, therefore, it would be distressing to Prannath Chowdhree to have to attend at the Sudder Court.

The case was postponed until after the holidays, and the necessary intimation was given to the vakeels of Prannath Chowdhree, Baboos Ramapersad Roy and Kishenkishore Ghose, for Prannath Chowdhree's attendance on the 26th March last.

On the case being called up, it appeared that Prannath Chowdhree was not in attendance. Mr. Money therefore, as counsel for the plaintiff, requested that the Court would decide the case under Section XXIV. of Act XIX. of 1853; and, as Prannath Chowdhree was the appellant in the case, dismiss his appeal, with costs. Counsel added that his client would be quite satisfied to take his decree as against the 8 annas of the share of the property owned by Anundchunder, now in the hands of Prannath Chowdhree, and would not require that the order of the court on appeal, as to Kassinath Chowdhree and the other defendants, should be interfered with.

We still think that the conditional sale, alleged to have been executed by Anund Chuckerbuttee in favor of Koodrootoolah, (who has been shown to be a mere man of straw,) dated 25th February 1841, and the subsequent proceedings for foreclosure of the same, and also the conveyance by Koodrootoolah to Prannath Chowdhree and his nephews, the other defendants, on the 23rd September 1847, are so suspicious that, for the purposes of justice, the attendance of Prannath Chowdhree in order to give his evidence regarding those transactions is very necessary. He has now failed to appear, though summoned, and we are called upon by the counsel for the plaintiff, respondent, to act against the absconding defendant under the stringent terms of Section XXIV. of Act XIX. of 1853.

The summons issued was not, in the first instance, actually and personally served; but from the medical certificate put in by the Baboo, together with the terms of the petition then presented on his behalf, we think that a constructive personal service, sufficient to meet the requirements of Section XXIV. of Act XIX. of 1853, may be inferred. Such being the case, and as the matter before us is one calling for a strict exercise of the power vested in us by law, we, in accordance with the terms of Section XXIV. of Act XIX. of 1853, dismiss the appeal of Prannath Chowdhree, and, as to the 8 annas of the property now in his possession, affirm the order of the court below, declaring it liable to sale for the sum decreed to the plaintiff as due from Anundchunder Chuckerbuttee. As to the share

of the property belonging to the other defendants, as the plaintiff does not require that the previous order of the Court in appeal as to it should be disturbed, it is unnecessary to do more than confirm that order. The costs of both courts, as between the plaintiff and Prannath Chowdhree, will be borne by Prannath Chowdhree. The costs of both courts, as between plaintiff and the other defendants, will, by agreement, be borne by each party respectively ; and the expenses incurred by Government will also be borne by Prannath Chowdhree.

THE 28TH APRIL 1859.

C. B. TREVOR, ESQ., Judge, and E. A. SAMUELLS and G. LOCH, ESQS.,
Officiating Judges.

Case No. 655 of 1858.

Special Appeal from the decision of Baboo Dwarkamath Roy, Principal Sudder Ameen of Tipperah, dated 14th April 1858, affirming a decree of Abdool Khallek, Moonsiff of Toobkibagra, dated 30th December 1857.

The Collector of Tipperah, (Defendant,) *Appellant,*
versus

Gourchunder Pundit, (Plaintiff,) *Respondent.*

Baboo Ramapersad Roy, for Appellant.

Baboo Gopaul Lal Mitter, for Respondent.

A farming lease for a definite period constitutes a personal contract between the lessor and the lessee, by the terms of which they must be bound. Consequently, where the tenant was not empowered by the terms of the lease to sell or transfer, held, that the lessor was not bound to recognise a sale which the tenant had effected. There is no analogy between this case and that of hereditary tenures, which are salable by law.

THIS case was admitted to special appeal on the 30th September 1858, under the following certificate recorded by Messrs. C. B. Trevor and H. V. Bayley.

"Plaintiff, who is the purchaser of the remaining lease of a farm granted by Government to one Shumbhoochunder Mujoomdar of a khas mehal, sued the collector of Tipperah to enforce the recognition of the transfer to him, which the collector refused to do. The collector pleaded that the farmer has no power to sell his farming lease without the sanction of the lessor. The lower court, for various reasons into which we need not enter, decided in favor of the plaintiff.

"The collector now appeals specially, urging that a farming lease is a personal contract entered into by the lessor with the lessee, and that, consequently, without express terms in the lease, or sanction independently of the lease first obtained from the lessor, empowering a transfer, such transfer is null and incapable of enforcement.

"We think there is no question on the point before us. We therefore admit the appeal to try whether the decree of the lower court should not be reversed, and the plaintiff's suit dismissed."

JUDGMENT.

The respondent contends that, under the precedents of the 30th April 1858 (page 920), and those reported at page 418 of the Decisions of 1853, and page 192 of the volume of 1847, the purchaser in this case acquired a possessory *status*, which the collector was bound to recognise, and which he could not dispute except by means of a regular suit. There is no analogy however between those cases and that now before us. Those were sales of gantee, ryottee, and other hereditary sub-tenures, which the purchasers alleged to be transferable by law without the permission of the zemindar. In none of those does there appear to have been any written lease. In the present case the tenant holds a farming lease for a limited period. The lease constitutes a personal contract between the landlord, here the Government, and himself. By the terms of that contract he must be bound; and as it is admitted that it does not empower him to sell or transfer his lease, the judgment of the lower court must be reversed, and the appeal decreed, with costs.

THE 28TH APRIL 1859.

C. B. TREVOR, Esq., Judge, and E. A. SAMUELLS and G. LOCH, Esqs.,
Officiating Judges.

Case No. 637 of 1858.

Special Appeal from the decision of Mr. F. B. Kemp, Judge of Backergunge, dated 5th March 1858, affirming a decree of Pundit Sreenath Bidyabagish, Principal Sudder Ameen of that district, dated 16th January 1857.

Manikmulla Chowdhraim, mother and guardian of Pearceemohun Roy Chowdhree, minor, and others, (Defendants,) *Appellants,*
versus

Parbuttee Chowdhraim, mother of Mathooranath Roy Chowdhree, minor, (Plaintiff,) *Respondent.*

Baboos Shumbhoonath Pundit, Unookoolchunder Mookerjee, and Ashootosh Chatterjee, for Appellants.

Baboos Ramapersad Roy and Kishenkishore Ghose, for Respondent.

THIS case was admitted to special appeal on the 28th September 1858, under the following certificate recorded by Messrs. C. B. Trevor and H. V. Bayley.

Plaintiff obtained a decree against a Hindoo widow, his co-sharer, for her

share of the Government revenue, which he had been compelled to pay in order to save the joint estate from sale. On proceeding to execute the decree by sale of the widow's share, he found that she had exercised a right of adoption she possessed, and had passed the property to her adopted son. The judge refused to allow him to execute the decree against the minor's share, and he, therefore, brought a suit to have the minor declared liable for his mother's debt.

Held, *first*, that the suit will lie; *second*, that, if the property had continued in the widow's hands, it would have been liable to sale for a debt of this description; *third*, that an adopted son is liable for debts contracted by the widow as proprietor of the estate, when such debts are contracted under necessity and for the benefit of the estate.

"Petitioner was a co-sharer in a portion of the estate of Chunder-deep with plaintiff. Plaintiff, to save the property from sale, paid in for the petitioner (defendant) the revenue due to the kist of Phalagoon 1258 B. S. (rs. 700). Plaintiff sued petitioner and her husband's brother, Gopalkisto, for the amount, and got a decree against petitioner (Manikmulla) alone. In execution, objection was taken that the decree was personal against petitioner, and that the sale of the landed property in which Manikmulla's minor son had a share could not be made. The principal sudder ameen held summarily that objection to be untenable, and ordered the sale. The judge, however, held summarily that it was a good objection, and that Manikmulla was responsible personally, and not the estate. The plaintiff then sued to set aside the summary order of the judge, and to sell the landed property, and both the lower courts have held that the estate is liable, and not Manikmulla personally.

"Manikmulla now appeals specially on behalf of her minor son interested in the estate. The pleas are :

1st, that this suit cannot lie against her as guardian of the minors, when it has been before ruled by a final decision in a regular suit that the decree was against her only, and extended no further.

2nd, that the law, Section IX. Act I. of 1845, and the precedents and practice of this Court, make the proprietors of estates, on whose account payments are made, personally responsible in such cases as this.

"We admit the special appeal to try the above points."

JUDGMENT.

Messrs. E. A. Samuells and G. Loch.—The plaintiff in this suit obtained a decree against Manikmulla Chowdhraïn as her co-proprietor in the estate of Chunderdeep, for her share of the Government revenue, which he had been compelled to pay in order to save the estate from sale. On proceeding to take out execution against her share in the joint estate, he found that she had exercised a right of adoption which she possessed, and that the share had passed into the hands of the adopted son. Under these circumstances the judge held that the decree could not be executed against the estate.

The plaintiff therefore now sues the minor, through his guardian, Manikmulla Chowdhraïn, to establish his liability for the decree which was passed against his mother. The question involved in this suit is quite distinct from that which was disposed of by the judge in the former case, and there is no reason therefore why this claim should not be heard and decided.

There can be no doubt, we apprehend, that, if the decree had passed against the husband of Manikmulla, the adoptive father of the defendant, the latter would have been responsible for the amount ; for, although we have always held that the decree for contribution

which a proprietor in an *ijmalee* estate obtains against his co-proprietors is a personal decree, this has merely been in the sense that it conveyed no lien on the estate binding against third parties, such as would have been derived from a decree under Section XIII. Regulation VIII. of 1819. It was never intended by these decisions to interfere with the ordinary law of debtor and creditor, or to rule that a decree, such as that obtained by the plaintiff in the present case, should not be executed against the share of the debtor when that share continued in his own hands, or in those of his representatives.

It only remains to be considered then, whether the fact of the liability having been incurred by the appellant's *mother*, when in possession of the estate as a Hindoo widow, instead of by his father, can operate to deprive the plaintiff of his remedy against the defendant. We can find no ground for the opinion that it can. It has been questioned whether, if the widow had continued in possession and had not adopted, the property would have been liable for seizure for a debt of this description ; but the case of *Gopeechurn Burrell*, reported at page 93 of the third volume of *Select Reports*, is directly in point, and would appear to set the question at rest. In that case the mother-in-law of a minor widow borrowed a sum of money for the purpose of discharging the arrears of Government revenue on the widow's estate, and applied it to that purpose. The Court held the widow liable, and directed that the estate "should be sold in satisfaction of the debt in the event of its not being liquidated without delay." A similar view of the law has been taken in the recent case of *Sreenath Roy*. In the case of *Kaleenath Lahoree*, decided on the 30th October 1849, it is to be gathered that, if the property, which the defendant had purchased in execution of decree, had been sold for any debt on account of which the widow could lawfully have alienated a portion of her estate, the Court would have upheld the same; and this, it appears to us, is the true principle. When the Hindoo law gives a widow a right of alienating the property of her deceased husband for the purpose of discharging debts of a particular class, it implies a corresponding obligation on her part to alienate when she has no other means of discharging those debts ; and in the event of her attempting to evade this duty, our courts of justice are bound to enforce it, as they would any other obligation. Indeed, where the law authorises a Hindoo widow to dispose of property under certain circumstances, the occurrence of these circumstances gives the widow the powers of an absolute proprietor, and entitles certain classes of creditors to treat her as such.

Then, as to the obligation of an adopted son to discharge debts for which his adoptive mother has become liable as proprietor of the estate previous to his adoption, we have not only the general rule of law, that property devolving upon parties must be taken with its

liabilities, but we have the authority of the case of Hurkoomar Roy, decided on the 25th February 1850, which is directly in point, the decree in that case having been given against the widows prior to the adoption, and executed by the Court's orders against the adopted son, and also the case of Mussumat Wuzerun, decided on the 11th February 1846, where the heirs were held liable for such debts as were incurred by the widow, "under necessity, for the benefit of the estate and for her own maintenance."

Now in this case there can be no doubt that the debt was incurred for the benefit of the estate, and that its repayment was a matter of necessity; for the estate must have been sold but for the payment made by the plaintiff, and the precedents of this Court empower him to compel repayment from the proprietor of the share in default. That the widow did not incur the debt voluntarily, that is, that she did not herself borrow the money, for the probabilities are, she must have wittingly allowed the plaintiff to contribute her share of the revenue in addition to his own, is quite immaterial; for the law places shareholders in joint estates, who advance money for the payment of the revenue due from their co-sharers, in precisely the same position as ordinary creditors; and sharers who omit to pay their quota incur the same liability towards the sharers who make good their deficiency, as if they had executed a bond in his favor.

Under this view of the law we affirm the decision of the court below, and dismiss the appeal, with costs.

Mr. C. B. Trevor.—It appears that the defendant, petitioner, Manikmulla Chowdhraïn, was a co-sharer with plaintiff in the present case of the estates, made up of an 8a.-12g.-2c.-2k. share of pergunnah Chunderdeep; that there was a balance of rs. 700 due from petitioner, which the plaintiff, in order to prevent the sale of the estate, was compelled to pay; that he then brought a suit against the petitioner, who was in possession as a Hindoo widow with a power to adopt, but who had not then exercised the power; that he obtained a personal decree against her, and lotted the share of the estate on account of which the revenue had been paid in for sale; that, in execution, one Nuddeechand Shaha, representing himself as the well-wisher of the son who had previously been adopted by the petitioner, objected to the sale of the minor's property in execution, on the ground that, as the decree was a personal one against the petitioner, the minor, who had then not been adopted, could not be made liable for it. The lower court rejected this objection, but the judge, on appeal, relying on a precedent of this Court,* dated 21st February 1855, reversed the order of the lower court.

* See Decisions of 1855, page 44.

In consequence of the judge's order, the plaintiff then brought the present suit to reverse that summary proceeding, and to bring the property, on account of which the revenue was paid in, to sale in execution ; and as Manikmulla asserts that she has adopted a son, she is sued as mother and guardian of the minor.

The court of first instance gave plaintiff a decree. The judge on appeal, on the issue whether the plaintiff can recover the amount he sues for by sale of the estate of the minor adopted son of Manikmulla, has held that the share in the estate, and not Manikmulla personally, is responsible, and the plaintiff is entitled to recover what he paid from the share in the estate. It is true, remarks the judge, that, at the time the payment by the plaintiff was made, the adoption of Manikmulla's son had not taken place, but she herself admits that she held a power from her husband to adopt ; and that her husband demised in 1251. In the case of a Hindoo widow a permission to adopt is tantamount to her being *enceinte*, and the son subsequently adopted has all the rights of a posthumous son. It is admitted that the moneys paid into the collectorate were credited to the share of Manikmulla, which was then in balance. The payment to the plaintiff saved the whole estate from sale, and the payment alone preserved the title of the minor. Clearly the estate of the minor is liable, and not Manikmulla personally. He therefore dismissed petitioner's appeal.

The defendant Manikmulla Chowdhraïn now appeals specially, urging that the civil court having, at the suit of plaintiff, once given a personal decree against her, for the amount paid by the respondent, it is not competent for plaintiff to sue her minor son and herself, as his mother and guardian, for the same amount ; that if her son were her heir, doubtless he would be liable, and, in execution of the first decree, his property could be sold ; but as the son is not her heir, the first court very rightly refused to allow execution to go out against the estate of her son ; and as a personal decree against herself has been passed, the present action will not lie.

On the other side, it is urged that the payment made by the plaintiff benefited the minor son subsequently adopted by the special appellant, for whose adoption she alleges that, at the time of the payment, she held a permission from her husband ; that, consequently, on every principle of equity, he, as well as his mother, notwithstanding the previous personal decree against her, should be made liable for the amount paid to save the estate, now in his possession, from sale.

The judge, it will be observed, has decided the present case in plaintiff's favor on two grounds, both of which seem to me to be erroneous. The first is, that the estate on account of which the sum sued for was liable for the amount paid by the plaintiff, and not the defendant, Manikmulla Chowdhraïn ; and the second is,

that as, at the time of the payment, the widow held a power to adopt, the son, when adopted, had all the rights of a posthumous son, and, consequently, she was in possession subsequently to her husband's death.

Now, without noticing first the objection that the decision of the judge is opposed to the previous ruling of the principal sudder ameen, a court of competent jurisdiction, on the same matter, I would observe, *first*, that payments made by a party interested, whether proprietor, mortgagee, or under-tenant, to save an estate from sale, have been held by this Court in many decisions, amongst others that of the 21st February 1855, cited by the judge in his summary proceedings, to be personal claims against the parties for whom, and not liens on the estate on account of which, they were made; and, *second*, that it has also been ruled in the case of Tarinee Shyee Debea *versus* Bamundass Mookerjee and others, (Decisions of 1850, pages 533 to 555,) that a son, adopted by a widow under a deed of permission from her husband, only succeeds to his rights as son from the date of his actual adoption, and previously to that date his mother has all the rights of a childless Hindoo widow. It seems to me, therefore, that the grounds on which the judge decided the case are altogether untenable.

An action by one sharer against another sharer of an estate, for revenue paid to save the estate from sale, is founded upon a previous implied request supporting the payment. In cases in which one man to save himself is compelled to do that which another ought to have done, and was compellable to do, the law implies a request; and no proof of an actual or expressed request is necessary. But it appears to me that a claim founded on such payment is strictly a personal one, and that, looking to the present case, after a personal action has been brought, and a decree obtained against the special appellant, the widow in possession, for the amount paid by the plaintiff with a view of saving the estate, in which both parties were at the time interested, from sale, it is not competent to the same plaintiff subsequently to sue an adopted minor son, and the widow, as his mother and guardian, on the ground that benefit accrued to the minor from the payment, for the very same amount. Any heirs of the person, against whom the personal action was brought and decree was obtained, would, if they inherited from her property, be liable for the amount of the decree, but, during her life-time, she and she only is liable for the personal decree against her, and the subject of that decree has become a *res adjudicata*; and any other suit brought with a view of fixing that declared personal liability on any third party, on any ground whatever, must necessarily be dismissed. Moreover, the payment in the present instance was made primarily to save the interest of the plaintiff in the estate. It also preserved the interest of the widow in possession, and, on account of the sum so

paid, he had a personal action against her. This action he brought and obtained a decree; and had she remained to the present day in possession of the property as widow, and never adopted a son, he would have been unable to bring her interest in her husband's estate *to sale in execution*, though probably he might have sequestered the rents in execution. The adoption of a son, therefore, as to the liability of the estate for the decree and sale, put the plaintiff in no worse position than he was. He had a personal action against the widow. He brought it, obtained a decree against her, and, whether she be widow in possession or not, he must realise the amount of the decree from her and from her only. As to the argument that, because the minor son subsequently adopted was benefited by the payment, therefore the personal liability of the widow can be shifted to him, it appears to me to be perfectly inconsistent with the personal character of the liability of the widow. Had the minor inherited, he, doubtless, would have been liable; but as that is admittedly not the case, no shifting of the personal liability to him is, in the present case, legally admissible. On the view of the case adopted by me, it is unnecessary to enter into the question whether, under any and what circumstances, a minor can be made liable for the legal obligation of a widow, contracted previously to his adoption but for the evident benefit of the property subsequently inherited by him; for even if in some cases he might be made liable, that doctrine cannot, in my opinion, apply to a case similar in its circumstances to that now before the Court.

Under the view expressed above, I would reverse the order of the court below, and decree the special appeal, with costs.

THE 30TH APRIL 1859.

H. T. RAIKES and A. SCONCE, Esqs., Judges, and H. V. BAYLEY, Esq.,
Officiating Judge.

Case No. 616 of 1858.

Special Appeal from the decision of Mr. E. S. Pearson, Additional Judge of Dacca, dated 20th March 1858, affirming a decree of Mr. T. C. Pennington, Sudder Ameen of that district, dated 22nd April 1857.

The Collector of Tipperah, (Defendant,) *Appellant*,
versus

Golukchunder Shaha and others, (Plaintiffs,) *Respondents*.

Baboo Ramapersad Roy, for Appellant, *Ex-parte*.

THIS case was admitted to special appeal on the 23rd September 1858, under the following certificate recorded by Messrs. H. T. Raikes and J. H. Patton.

Held, that
as Regulation
VIII. of 1819
specially allows

others than the defaulting putneedar to lodge the arrears before the day of sale, the term "unless the amount of the demand be lodged," made use of in Clause 1, Section XIV. Regulation VIII. of 1819, cannot be intended to refer to the putneedar, but to the other persons alluded to, as entitled to lodge the amount and stop the sale.

"This application is made by the Government pleader on the part of the collector of Tipperah under the following circumstances.

"The collector of Tipperah having refused to receive payment of arrears *on the day of sale* under Regulation VIII. of 1819, the owner of the putnee, on the ground that he had on that day tendered the amount to him at the time of sale, brought a suit to reverse the sale; and the courts below, holding the collector to have been bound, under Section XIV. Regulation VIII. of 1819, to receive the arrears, have reversed the sale, and saddled the Government with the whole of the costs as zemindar.

"The special appeal is on the ground of this Court's ruling in the case of Nobokissen Mookerjee *versus* Khettermohun Chuckerbuttee, as given in their order on the application for a review of judgment in that case, at pages 733 to 737 of the Decisions of 1856, wherein the Court laid down that no *payment* of arrears could be made by the defaulting putneedar *on the day of sale*, Section XIV. only permitting the arrears to be *lodged* on that day when a summary suit was pending before the collector to contest the amount claimed by the zemindar in the sale advertisement. That in the present case no such reason existed for *lodging* the money, and the collector was therefore fully justified in refusing to receive payment on the day of sale.

"We admit the special appeal to try this point, and also whether the Government can, under any circumstances, be held liable for the costs as zemindar."

JUDGMENT.

Mr. H. V. Bayley.—The question for decision in this admitted special appeal is, whether payment or tender of payment, by a putneedar, on the day of, or just before sale, is sufficient to make it obligatory on the collector holding the sale to stay it, with reference to the provisions of Section XIV. Regulation VIII. of 1819.

Reading the Section by its distinctive terms as to be found in Clause 1 and Clause 2 respectively, it is, as I think, intended in the law, by those terms, that *lodging* the money could be done on the day of sale in reference to a pending summary suit contesting the demand, and, in that contingency *only*. I think the Sudder Dewanny Adawlut's precedent of the 27th August 1856, the review of Khettermohun Chatterjee's case, gives the correct and proper interpretation of the law from its own terms and context. I refer especially to the reasoning in pages 735 and 736. That case refers to a durputneedar. But the construction of Section XIV. then given will apply with greater force as against the putneedar, it being required by that law that he should *pay* before the

day of sale, with the proviso that he may *lodge only* in the exceptional contingency of a pending summary suit. I have referred to the papers connected with the enactment of Regulation VIII. of 1819; and I think Mr. Prinsep's report, which accompanied and explained his draft of that law, and the draft itself (extracts of which are annexed,)* support this view.

Holding, then, that the petitioner is entitled to a decree on this special appeal, the question of liability for costs does not arise.

* *Extract No. 1 of Mr. Prinsep's Report.*

Sixthly.—In order to enable them to avert the ruin of a sale, the under-tenants may be allowed the means of staying it, by *lodging* the money, in case the superior tenure be advertised for an arrear; and any advance of cash for that purpose, if made from private funds, may be considered as a *loan upon mortgage*, with the usufruct.

Seventhly.—A mode of preventing the first talookdar's collusion with the zemindar to ruin his inferiors is also practicable by destroying their advantage therein. If the sale be public to the highest bidder, and made by a public officer, neither will be able to control those who bid; and if the excess proceeds of the sale be kept to answer the claims of inferiors, so that neither shall benefit by the enhanced price, what interest can they have in causing a sale? This point is explained at length in the memorandum.

Eighthly.—As it is possible, however, to imagine a community of interests between the zemindar and the talookdar, he must certainly not be allowed to sell of his own authority, when such are to be the consequences, but for want of other auctioneers the public officers must undertake the duty.

Ninthly.—It will be of little use, however, selling at all, without assuring to the purchaser immediate entry on his purchase. Any loss he may expect to suffer in getting possession will, of course, be so much to be considered in the bidding. Hence, the want of a rule to assure him possession is an injury as well to the zemindar's security in the sale as to all others who might benefit from a full equivalent being got for the tenure.

Tenthly.—The purchaser ought further to be assured against the chance of having to maintain a difficult action to justify the sale at which he bought, or this also will always operate to prevent a full equivalent being obtained for the tenure sold.

Extract No. 2 of Mr. Prinsep's Report.

7. My rule to give effect to this last principle will, perhaps, require a little explanation. I propose to assure the purchaser at a public sale, made regularly as provided, against any avoidance of the sale at suit of the defaulter, even though he should prove there to have been no balance. At first sight this will perhaps seem severe, but in its operation I do not think it will be found so, while the assumption of the principle can be justified in reason. In the first place, *if the zemindar's demand is contested, a summary investigation is allowed to bring the matter to issue, and if the amount is lodged to assure the zemindar of his demand eventually upon the award*, the sale can be stayed altogether. The whole sacrifice, therefore, imposed as the condition of his averting the evil, is the necessity of taking up money and losing its use for the short period between the day of sale and the decision of the *summary suit pending*, that is, if the talookdar has a good plea on which to stay process on the zemindar's demand. Under the present rules he has to submit to be out of his money from the day the process may be served up to the date of the award, or go to jail without remedy. I allow him, therefore, to save his tenure at a less sacrifice than he could save his person, only providing that, if he does not avail himself of the means thus left open to him, the process against the tenure shall be as absolute as it is now against the person. Damages he would have equally in both cases to any extent.

Mr. H. T. Raikes.—The respondent, a defaulting putneedar, having neglected to pay up the balance on his putnee until the day of sale, tendered the amount to the collector after the sale commenced, which the collector then refused to receive, and proceeded with the sale of the tenure. The present suit is to cancel that sale, on the ground that the collector was bound to receive the amount when tendered ; and the courts below have held that the terms of Section XIV. rendered it incumbent on the

Original Draft Law—Enclosure in Mr. Prinsep's Report.

Extract No. 3.

SECTION XVI. *Clause I.*—Because of the injury that may be brought upon the holder of the second degree, by the operation of the preceding rules, in case the proprietor of the superior tenure purposely withholds the rent due from himself to the zemindar, after having realised his own dues from the inferior tenantry, it is therefore deemed necessary to allow such talookdars a means of saving their tenures from the ruin that must attend such a sale. The following rules have accordingly been enacted for this purpose.

Clause II.—Whenever the tenure of a talookdar of the first degree may be advertised for sale in the manner required by Clauses III. and IV. Section X. of this Regulation, for arrears of rent due to the zemindar, the *talookdars of the second degree, or any number of them*, shall be entitled to stay the final sale by paying into court the amount of balance that may be declared due by the person attending on the part of the zemindar on the day appointed for sale. In like manner they shall be entitled to *lodge money antecedently* for the purpose of eventually answering any demand that may remain due on the day fixed for the sale ; and should the amount lodged be sufficient, the sale shall not proceed, but, after making good to the zemindar the amount of his demand, any excess shall be paid back to the person or persons who may have lodged it.

Clause III.—If the amount so lodged shall be rent due by the inferior talookdars to the holder of the advertised tenure, the same shall be stated at the time of making the *deposit*, and the amount shall be carried to the account of the tenant or tenants lodging it, and be deducted from any claim of rent that may at the time be pending, or be thereafter brought forward against him or them, by the proprietor of the advertised tenures on account of the year or month for which the notice of sale may have been published.

Clause IV.—If the person or persons making such a deposit, in order to stay the sale of the superior tenure, shall have already paid the whole of the rent due from himself or themselves, so that the amount lodged is an advance from private funds, and not a disbursement on account of the said rent, such deposit shall not be carried to credit in or set against future demands for rent, but shall be considered as a loan made to the proprietor of the tenure preserved from sale by such means ; and the talook so preserved shall be the security to the person or persons making the advance, who shall be considered to have a lien thereupon in the same manner as if the loan had been made upon mortgage, and he or they shall be entitled, on applying for the same, to obtain immediate possession of the tenure of the defaulter, in order to recover the amount so advanced from any profits belonging thereto. If the defaulter shall desire to recover his tenure from the hands of the person or persons, who, by making the advance, may have acquired such an interest therein, and entered on possession in consequence, he shall not be entitled to do so, except upon repayment of the entire sum advanced, with interest up to the date of possession having been given as above, or upon exhibiting proof in a regular suit, to be instituted for the purpose, that the full amount so advanced, with interest, has been realised from the usufruct of the tenure.

collector to stay the sale under the circumstances above stated, and they have accordingly reversed the sale.

It is argued that, as Section XIV. Regulation VIII. of 1819 enacts that, "should the balance, as claimed by a zemindar, on account of the rent of any under-tenure, remain unpaid upon the day fixed for the sale of the tenure, the sale shall be made without reserve in the manner provided for in Sections IX. and X. of this Regulation ; nor shall it be stayed or postponed on any account, unless the amount of the demand be lodged," the sale in the present case was imperative, the putneedar having no right to lodge the money on the special ground reserved by Clause 2 of the Section, and the collector being required by the law to sell without reserve under all other circumstances.

It appears to me that, as the tender of the amount of the demand was intended by the putneedar to be a direct payment of the balance, and the words of the law are, "that the sale shall not be stayed or postponed on any account, unless the *amount of the demand* be lodged," it follows that the words "unless the amount of the demand be lodged" must either be held to be synonymous with "unless the amount of the demand be paid," or the putneedar must have been entitled to lodge the amount with the view to some ulterior payment, otherwise the staying or postponement of the sale on the mere tender of payment would seem to be opposed to the stringent provisions of the law, which enacts that "the sale shall not be stayed or postponed on any account."

We need not enquire whether the putneedar was privileged to lodge the amount of the demand with the view of ulterior payment, as he does not himself assert that he acted with any such intention ; he contends that he was entitled to pay up the demand while the sale was proceeding ; and that the signification of the term "unless the amount of the demand be lodged" is thus to be construed, and that he was, consequently, acting within the provisions of the law and entitled to its protection.

Now it appears to me that the natural signification of the term *lodging* money is equivalent to depositing it, and that, when the law speaks of the sale being held without reserve unless the money be lodged, it does not mean to say unless the money be paid by the defaulter ; and, moreover, that, if it contemplated his right to pay in the money to be reserved to him during the entire time of sale, it would have been utterly useless to impress upon the collector the imperative necessity of proceeding with the sale if the tender of the balance could at any time avert such a result. But if, on the other hand, the sale can only be stayed or postponed on the day of sale, if the amount of the demand have been *lodged*, and the parties entitled to lodge the amount are others than the

defaulter himself, the imperative nature of the instructions imposed upon the collector seems to me quite intelligible and consistent with the obvious intention of the law itself, namely, the prompt realisation of the arrears before the day of sale, and the creation of a right in talookdars of the second degree to stay the sale by *lodging* the amount of the demand *antecedently*.

A reference to Section XIII. of the Regulation will show that the same term is repeatedly used in reference to the right of such under-tenants to lodge money, previous to the day of sale, as a precautionary measure, from which, "if the amount *lodged* be sufficient," payment of the demand may be made on the day of sale; and I entertain no doubt from the whole context of Section XIV. that the proviso, regarding the amount of the demand being *lodged*, has reference to any money so placed *antecedently* as a precautionary measure, or as provided for in Clause 2 of the Section. But it must be borne in mind that the putneedar himself cannot *lodge* money antecedently, as provided for by the law for the safety of the durputneedars; and that the law does not, either in words or in spirit, lead to the belief that a direct payment of the arrears is open to him at any time during the sale proceedings. As then I come to the conclusion, that the signification of the words, "unless the amount of the demand be *lodged*," does not mean any direct payment by the defaulter at any time, I hold those words do not confer any privilege of payment upon him after the sale has commenced; and I can see in them no sanction for postponement of the sale on such a ground. I, therefore, hold the collector to have been fully justified in proceeding with the sale, and I concur with Mr. Bayley in reversing the judgments of the courts below.

The case of Nobokiassen Mookerjee *versus* Khettermohun Chuckerbuttee, referred to by the special appellant's pleader, as stated in the certificate, does not provide a conclusive ruling for this case, as, in the case referred to, the question arose as to whether a *durputneedar* could stay a sale by *lodging* money when the sale was proceeding; whereas, in the present case, the question refers to the defaulter himself, and while the law *does* provide for money being *lodged* before the sale by a durputneedar, it nowhere contemplates a similar process by the defaulting putneedar, who can discharge his arrears by a direct payment only, not by *lodging* money antecedently.

The decision of the lower court is reversed, with costs.

Mr. A. Scone.—This suit has been brought to set aside a sale made for arrears of rent under the provisions of Regulation VIII. of 1819. In conformity with Clause 2, Section VIII. of this law, the sale of the talook was fixed for the 1st Jeyt 1261, and the notice of sale runs to the effect that, if the arrears claimed be not paid before that day, the tenure would be sold. It happened, however, in this

case, as stated in the plaint, and apparently admitted by defendants, that the 30th Bysakh and the 1st and the 2nd Jeyt were close holidays, and the sale took effect on the 3rd Jeyt. Then it is found below as a fact, that the arrear due was paid into the collector on the 3rd Jeyt, before the sale was made ; and the point for determination is, whether the zillah judge has rightly held that the payment of the arrear (or, as said by the admitting judges, tender of payment) on the day of sale required the collector to suspend the sale.

Clause 1, Section XIV. Regulation VIII. of 1819 recites that, "should the balance claimed by the zemindar, on account of the rent of any under-tenure, remain unpaid upon the day fixed for the sale of the tenure, the sale shall be made without reserve, in the manner provided for in Sections IX. and X. of this Regulation ; nor shall it be stayed or postponed on any account, unless the amount of the demand be lodged." These words are unambiguous and broad, and I would interpret them in the natural sense of the language employed. On the one hand there is a general injunction to complete the sale if the arrear remain unpaid upon the day of sale : and on the other, it is added that the sale shall not be stayed unless the amount of the demand be lodged. These last words clearly indicate to my mind that, though the arrear may not have been paid up on any day before the sale day, nevertheless, if it were lodged on the day of sale, the sale is required to be stayed. The plain meaning of the law, as I think, is that the sale shall not go on if the zemindar's demand be satisfied, even on the day fixed for the sale. The term "lodge" I take to be equivalent to having or paying in ; and if the arrear due be lodged, the sale should, by law, be stayed.

It has been argued that the power to lodge the money due on the day of sale is confined to one class of cases, and that Clause 2, Section XIV. indicates the contingency under which, by lodging the money on the day of sale, the sale may be stayed. This clause provides that, on the application of the defaulter within the period of notice, a summary investigation into the amount claimed by the zemindar shall be instituted, and directs that, even in this case, the sale shall go on if the enquiry be incomplete and the amount claimed be not lodged. But, in fact, the very first words of Clause 2 show that this clause provides for *other* cases than the cases contemplated in Clause 1. These words are, "in cases *also* in which a talookdar may contest the zemindar's demand," and so on : that is, as I understand by Clause 2, an additional provision is made for the contingency if a talookdar satisfy the amount claimed from him ; but this provision is unconnected with and cannot qualify the specific provisions of the 1st Clause, which provide generally and simply for the payment of the rent due.

For the above reasons I think the zillah judge has rightly construed the law in reversing this sale. But the peculiar circumstances of this case suggest as well an important consideration. By Section VIII. of the Regulation thirty days' notice is given of the intended sale. Within that period, as of course, the defaulter is expected to satisfy his zemindar's demand. But suppose that a zemindar for some days before the sale should close his place of business and absent himself, so that a tenant should have no means of paying the rent which he was ready to pay : does the law mean that the ready money should not be received on the day of sale ? The facts of this case appear to conform to that supposition. Government was the zemindar on whose behalf the sale was notified ; the collector acted as representative of Government. But it appears that, in consequence of a close holiday, the sale was postponed from the 1st to 3rd Jeyt ; and it is added that, on the 30th day of Bysakh also, that is, the day preceding the advertised day of sale, the collector's office was closed. In other words, the treasury being closed on the 30th Bysakh, the talookdar could not pay the rent which he was ready to pay : nevertheless, when the office opened for business, the collector refused to credit the money offered to him in liquidation of his demand, and went on with the sale.

THE 30TH APRIL 1859.

H. T. RAIKES and J. H. PATTON, Esqs., Judges, and G. LOCH, Esq.,
Officiating Judge.

*Special Appeals from the decision of the Honorable R. Forbes,
Judge of Tirhoot, dated 30th December 1857, reversing a
decree of Moulvee Iradut Alee, Sudder Ameen of that district,
dated 27th July 1857.*

Case No. 429 of 1858.

Mahadeo Dutt *alias* Karoo Singh and others, (Defendants,) *Appellants,*
versus

Purmeshureepersad Narain Singh and another, (Plaintiffs,) *Re-*
spondents.

*Baboo Unnodapersad Banerjee and Kishenkishore Ghose
and Mr. G. S Fagan, for Mahadeo Dutt and Rughoobuns
Suhye, Appellant.*

*Baboo Ramapersad Roy, Mr. R. T. Allan, and Moonshee Ameer
Alee, for Respondents.*

Case No. 430 of 1858.

Mahadeo Dutt *alias* Karoo Singh and others, (Defendants,) *Appellants,*
versus

Purmeshureepersad Narain Singh, and another, (Plaintiffs,) *Re-*
spondents.

Baboo Unnodapersad Banerjee, for Appellants.

Mr. R. T. Allan and Moonshee Ameer Alee, for Respondents.

THESE cases were admitted to special appeal on the 9th July 1858, under the following certificate recorded by Messrs. A. Sconce and D. I. Money.

Case remand-
ed, as the point
at issue was not
stated by the
judge, nor the
reasons for re-
versing the or-
der of the lower
court recorded
in full.

"This suit was instituted for the purpose of trying the question of the plaintiff's title to a 3-anna share of certain villages, of recognising or re-affirming plaintiff's possession of that share, and of reversing a survey award which held the defendants, petitioners, to be in possession and recorded them as maliks.

"The suit was nonsuited by the sudder ameen, because he found from the evidence that plaintiff was not in possession, and because he considered, with reference to the decision of this Court made on the 3rd April 1854, (page 139,) that the question of right could not be tried.

"On appeal, the zillah judge, following an order made by a single judge of this Court, on the 12th May 1857, has remanded the suit that the question of title may be entered on as well as the question of possession, 'as an order of nonsuit in cases of this kind is, under

the provisions of Act XIII. of 1848, a denial of justice, by excluding the party nonsuited from the possibility of again bringing his action.'

"Defendants now ask for the admission of a special appeal to maintain the soundness of the sudder ameen's judgment. The decisions of 3rd April 1854 and 10th March 1851 are relied upon. These decisions appear to us to very materially support the petitioners' plea; but at the same time it appears doubtful whether, in the suit now before us, an order of nonsuit is imperative. The issue of title was prominently raised in the plaint; and though plaintiff required that his possession should be re-affirmed, he at the same time recited the possessory awards made by the revenue authorities in favor of the defendants, and adverse to the occupancy asserted by himself. Besides, plaintiff asserted that the defendants were his tenants, and in that sense recognised their possession as subordinate to himself. But upon the whole we think it desirable that the case should be considered by a full bench.

"The same order applies to 486. Both cases should be entered in the list of certified special appeals."

JUDGMENT.

The certificate does not clearly set forth the point which the Court are now called upon to try; and the judge's decision, from which the special appeal has been made, sets forth none of the facts of the case to enable us to judge of the propriety or otherwise of the order of nonsuit passed by the principal sudder ameen, which order has been reversed by the judge. From the statements made by counsel before us, it appears that the plaintiff, with whom a settlement of certain lands has been made, sued to obtain a declaration of title and the alteration of certain measurement chittas in which the defendants, who are occupants of the settled lands, have had their names recorded as maliks. The principal sudder ameen, on the ground that plaintiff had failed to prove possession, nonsuited the case without going into the question of title; but on appeal the judge remanded the case, directing the principal sudder ameen to investigate not only the fact of possession, but also the question of title: and the defendants have come up in special appeal to have the order of the first court, nonsuiting the case, confirmed. We are however, as stated above, unable, from the judge's proceeding, to ascertain upon what grounds he reversed that order, (the precedent quoted by him being inapplicable,) or whether it be or be not necessary in the present case for the plaintiff to prove possession and what kind of possession. We, therefore, remand the case to the judge, who will record the point in issue between the parties, and his reasons for setting aside the proceeding of the first court, should he still think such order necessary.

THE 30TH APRIL 1859.

C. B. TREVOR, ESQ., Judge, and E. A. SAMUELLS and G. LOCH, ESQS.,
Officiating Judges.

Case No. 598 of 1858.

Special Appeal from the decision of Mr. R. J. Scott, Judge of Patna, dated the 19th February 1858, affirming a decree of Moulvee Syud Sukhawut Hossein Khan, Additional Principal Sudder Ameen of that district, dated 13th May 1857.

Ruttunlall, (Plaintiff,) Appellant,

versus

Mussumat Jogoo Koonwur and others, (Defendants,) Respondents.

Moonshee Ameer Alee, for Appellant.

Baboo Unookoolchunder Mookerjee, for Bipperia and others, Respondents.

THIS case was admitted to special appeal on the 21st September 1858, under the following certificate recorded by Messrs. H. T. Raikes and J. H. Patton.

"In the judge's judgment there are these words: 'With reference to the appeal of Musst. Parbuttee and Radha, I observe that the additional principal sudder ameen states in his decision that the mortgagors should not be called on to pay their mortgage money a second time, and so far his opinion is correct; but his reasoning, that they were in fault because they paid the money to Jogoo, when they knew that plaintiff had a right to a share in it, is defective. They paid the heirs and representatives of the mortgagee, they being the only parties who had a legal claim on them, or could compel them to pay, or could give them a legal quittance for the obligation: by that payment the property was freed entirely. I therefore reverse so much of the order as is appealed against the appellants in this number.'

"On this point the special appeal is preferred, the special appellant urging that Parbuttee and Radha were parties in the suit by which his joint interest in the mortgage was established and recognised by the mortgagees, whom the judge has here described as having a legal claim on them for repayment of the mortgage money. Consequently they were perfectly aware of the interests petitioner held therein, and were bound in equity to discharge his share to him, and not to the other party mentioned.

"We think the sudder ameen was right in allowing petitioner to retain his interest over the mortgaged property, and admit this

cover the portion of the debt due to him. J admitted his right, but pleaded that the whole debt had been liquidated by the heirs of A, who had paid half to her and half to B, and had received their joint receipt. The heirs of A pleaded to the same effect, and filed the receipt, which has been declared spurious by the lower courts. Held, that, as the heirs of A had evidently colluded with J to defraud B, they, as well as J, must be held liable for the debt, and the mortgaged property would also be liable for sale.

A mortgaged property to B and C as security for a loan. C, in whose name the mortgage bond was drawn up, made over all his property in gift to his wife J, who claimed the whole of the debt due by A. B instituted a suit to establish his right to half the debt. This suit was amicably settled, B's right being admitted. J then sued the heirs of A for the debt, and this suit was also amicably adjusted, they giving a fresh bond, and she giving a receipt in full for the previous debt.

B now sues to set aside these arrangements as collusive, and to re-

special appeal to try whether the judge's order should not be reversed."

JUDGMENT.

Bheekoo Pauray obtained a loan from Ruttunlall and his brother Gunsham, and mortgaged some property as security for the debt. The mortgage deed was drawn up in the name of Gunsham, who made over all his property in gift to his wife Jogoo, who claimed the whole amount of the debt due by Bheekoo Pauray. Ruttunlall instituted a suit to establish his right to half the amount, which suit was amicably settled, and the right of Ruttunlall to half was admitted. Jogoo then brought a suit against Parbuttee and Radha, heirs of Bheekoo Pauray, to recover the amount due from him. This suit was also settled, the heirs of Bheekoo Pauray executing a fresh mortgage bond, and Mussumat Jogoo acknowledging payment of the previous debt. Plaintiff now seeks to set aside these arrangements between Jogoo and the heirs of Bheekoo Pauray as fraudulent, and to recover the half of the sum lent to that individual. The defendant, Jogoo, admitted the plaintiff's right to the share claimed, but stated that the heirs had repaid the sum, half to her and half to the plaintiff, and had received their joint receipt for the amount. The heirs of Bheekoo Pauray pleaded payment, and produced a receipt, signed by Jogoo and the plaintiff Ruttunlall. The principal sudder ameen, considering the receipt to be spurious, gave a decree against Jogoo, and declared the mortgaged property liable for the debt, but released the heirs of Bheekoo Pauray from the claim. On appeal the judge held that, as Jogoo had, on a previous occasion, when she settled her suit with the heirs of Bheekoo, declared that she alone had received the whole amount due from them, she alone could be held responsible for the amount due to plaintiffs; that as payment of the debt was admitted by her, the mortgage was extinguished; and, therefore, the plaintiff had no lien on the property.

From the pleadings we find that the defendants Parbuttee and Radha, heirs of Bheekoo, were aware that the plaintiff Ruttunlall was entitled to half the amount of the money due by Bheekoo; that though in the soolehnamah filed by them and Mussumat Jogoo in the suit formerly brought by Mussumat Jogoo against them, they had stated that they had paid the whole of the debt to Jogoo, and she acknowledged having received it; yet, in the present suit, they plead that they paid half to Jogoo and half to the plaintiff, and have produced a joint receipt for the amount, which has been held by both the lower courts to be spurious. As, therefore, these defendants have admitted the justness of the plaintiff's claim against them, and have failed to prove their plea of liquidation, we think the decree should be against them as well as against Jogoo, who has evidently colluded with them, and that the mortgaged property

should be considered liable for sale. We therefore reverse the order of the judge, and decree the appeal, with costs.

THE 30TH APRIL 1859.

C. B. TREVOR, Esq., Judge, and E. A. SAMUELLS and G. LOCH, Esqs.,
Officiating Judges.

Case No. 559 of 1858.

Special Appeal from the decision of Mr. A. Pigou, Judge of Moorshedabad, dated 22nd February 1858, affirming a decree of Baboo Gobindchunder Chowdhree, Principal Sudder Ameen of that district, dated 19th October 1857.

Syud Korban Alee and others, (Defendants,) Appellants,

versus

Atahoonissa Beebee, (Plaintiff,) Respondent.

Baboo Kishenkishore Ghose and Moonshee Ameer Alee, for Appellants.

Baboo Shumbhoonath Pundit and Moulvee Murhumut Hossein, for Respondent.

THIS case was admitted to special appeal on the 7th September 1858, under the following certificate recorded by Messrs. C. B. Trevor and H. V. Bayley.

"Plaintiff, Atahoonissa Beebee, sued special appellant for possession of certain lands with wasilat, as belonging to her ayma estate Suffeeoollah. The defendants claim the land as belonging to their ayma estate Atahosein, alleging that their ancestors purchased it from Peer Mohumud, the owner of ayma mehal, in 1183 and 1184 B. S., that the tahood of the lands in dispute was recorded in the name of Atahosein in exclusion of the name of Suffeeoollah, and that from that date they have held possession.

"As the plaintiff was an auction purchaser, the point in issue was whether the land pertained to Suffeeoollah's tahood before the decennial settlement, or to the tahood of Atahosein. The lower court gave plaintiff a decree, the judge finding, from a decree of the moonsiff of Kandee, dated 25th May 1836, that the lands were previously a portion of the tahood of Suffeeoollah, and that defendants have not proved the authority by which, according to their pleadings, the land became excluded from Suffeeoollah, and included within Atahosein, the estate of defendants.

"Defendants now appeal specially, urging that, as the judge has relied on the decision of the moonsiff of Kandee entirely, he should not have taken one point in the judgment of the moonsiff, but have looked at it in its entirety; that had he done so, he would have found that from 1184 the land in dispute has been in possession of

Held, that the judge has altogether misunderstood the import of the entire decree of the moonsiff of Kandee, dated 25th May 1836, upon which he has founded his decree. Case remitted, in order that the judge, having correctly interpreted that decree in the mode pointed out by the Court, and having re-considered the case, may pass whatsoever order may seem to him just and proper.

their ancestors as a portion of the ayma mehal of Atahosein ; that consequently the interpretation put upon the decision by the judge is incorrect, and his order should be reversed.

" We observe that the moonsiff finds distinctly that the land now in dispute was sold by Peer Mohumud to the defendants' ancestor in 1184 and 1183 B. E., some thirteen or fourteen years before the decennial settlement, and that the jumma of it is proved, from the record of mutation and dakhilas, to be 2-8-10, and that it has ever since 1183 and 1184 been in defendants' possession as a part of Atahosein.

" Under these circumstances we admit the special appeal to try whether, in the judgment of the moonsiff rightly interpreted, the suit of plaintiff should not be dismissed."

JUDGMENT.

We think that the judge has altogether misunderstood the import of the entire decree of the moonsiff of Kandee, dated 25th May 1836 ; for although that officer records that the land now sued for once formed a portion of the ayma estate Suffeeoollah, he also records that the land now in dispute was sold by Peer Mohumud, the owner of Suffeeoollah, to the defendants' ancestor in 1183 and 1184 B. E., some thirteen or fourteen years before the decennial settlement, and that it has ever since been in defendants' possession as a portion of Atahosein.

We therefore reverse the order of the judge passed under the erroneous interpretation of the moonsiff's decision, and remit the case to him, directing him, on re-consideration of the circumstances above noted, as found by the moonsiff of Kandee in the decision to which he has referred, to pass whatever order may to him seem just and proper.

THE 30TH APRIL 1859.

C. B. TREVOR, Esq., Judge, and E. A. SAMUELLS and G. LOCH, Esqs.,
Officiating Judges.

Case No. 779 of 1858.

Special Appeal from the decision of Mr. G. C. Fletcher, Judge of Chittagong, dated 3rd June 1858, reversing a decree of Baboo Tareeneechurn Dass, Acting Moonsiff of Bhatteearree, dated 11th February 1857.

Ramkanth and others, (some of the Defendants,) *Appellants,*
versus

Ramlochrn Acharj, son of Shumbhooram Acharj, deceased,
(Plaintiff,) and Puchanun Acharj and others, (Defendants,)
Respondents.

Baboo Kishensukha Mookerjee, for Appellants.

Moulvee Murhumut Hossein and Ramlochrn Acharj, for Respondents.

THIS case was admitted to special appeal on the 21st December 1858, under the following certificate recorded by Messrs. J. H. Paton and H. V. Bayley.

"This was a suit to gain reinstatement in membership of a community, and to recover cost of provisions wasted. The moonsiff held that, under the precedent of this Court, in the case of Ramguttee Biswas, dated 21st March 1850, such a suit did not lie, and dismissed it. The judge records in appeal, that the plaintiff urged that the precedent cited is not applicable, and he decided that it is not so, as the plaintiff claimed restitution on the ground of former membership not forfeited by any legal cause, while the defendants denied that membership. He then held that plaintiff was entitled to membership, and that defendants should not have withdrawn from the invitation they had accepted, and that, in consequence, they should pay for the provisions that had been wasted.

"Defendants, special appellants, urge that the suit does not lie, with reference to the precedent above cited, and the decision of this Court, dated 22nd November 1854, in the case of Phagoona Nae and others *versus* Menye Mitter and others.

"We admit the special appeal to try the point."

JUDGMENT.

The parties to this suit are Brahmins. In the village to which they belong there exists a *dul*, a caste association or coterie, the chiefs of which arrogate to themselves, or more correctly perhaps are permitted by the community to exercise, the power of excluding from membership any person whom they conceive to have offended against the laws of caste. The respondent, it appears,

In a suit for declaration of a right to be re-admitted to membership of a *dul*, and cost of food provided for an entertainment, which the other members of the *dul* had refused to attend, held, that the latter claim was absurd and could not be entertained, but right to membership considered capable of enforcement, and decreed in accordance with precedents cited.

fell under the ban of this coterie, although, as the judge finds, without any just cause ; the consequence of which was, that the appellants and several other persons, altogether amounting in number to nineteen, who had accepted an invitation to dine with him, refused to attend, and the good things he had provided were wasted. The respondent thereupon sued his recusant guests for the costs of the entertainment, and also for a declaration of his right to be re-admitted to membership, and the court below gave him a decree on both points.

The action for recovery of the cost of food provided for the appellants is an absurdity. It is not pretended that the respondent could have charged for the dinner if the appellants had eaten it ; and, however mortifying to the respondent the absence of his quondam friends may have been, the loss, it is evident, in so far as the waste of provisions is concerned, was that of the appellants, not of the respondent, for it was they who were to consume them, not he. This portion of the suit must therefore be dismissed. Exclusion from caste, however, is undoubtedly a very serious injury to a Hindoo ; and the civil courts are specially empowered, by Section VIII. of Regulation III. of 1793, to take cognizance of all suits and complaints respecting rights connected with caste. We observe from *Morley's Digest*, (the old series,) that such suits are very common in the Bombay courts, and that it is usual there to pass decrees for restoration to caste or to membership of religious associations, when parties have been unjustly excluded. In this Court suits of this description are rare. In the case of Sonaram Gazar, (13th April 1847,) however, we observe that the Court directed the principal sudder ameen to try the plaintiff's claim to be re-admitted to caste, and to decide it on its merits ; and in the case of Sonaoolla Koolla, (17th June 1848,) a full bench (present : Mr. Tucker, Sir R. Barlow, and Mr. Hawkins,) declared the appellant entitled to retain his position in caste, on the ground that the act of which he was accused was not such as to justify his expulsion. The cases of the 21st of March 1850 and the 22nd of November 1854, cited in the certificate, do not appear to affect the principle of this last decision. The first suit was brought to enforce a right to be summoned at all marriages in a particular locality, and to receive certain complimentary offerings on these occasions ; the second to compel certain barbers to shave the plaintiff. The Court were of opinion that decrees, such as those sought for, were incapable of enforcement, and therefore refused to grant them ; but there does not seem to be any objection on that ground to a declaration of right to membership, which is all the plaintiff in this suit seeks or the judge has awarded. This right, it is evident, can hereafter be enforced by a suit for damages,

if it should be infringed without just cause. Although, therefore, we think it would be more convenient that suits of this nature should be brought at once in the shape of actions for damages, we will not refuse the plaintiff his remedy, and we therefore affirm so much of the judge's order as declares the plaintiff entitled to be restored to the membership of his *dul*, and reverse his decree for damages on account of waste of provisions. The appellants will pay half the costs of suit.

THE 30TH APRIL 1859.

C. B. TREVOR, ESQ., Judge, and E. A. SAMUELLS and G. LOCH, ESQS.
Officiating Judges.

Special Appeals from the decision of Mr. P. Taylor, Judge of West Burdwan, dated 22nd February 1858, reversing a decree of Pundit Gobindchunder Bidyaruttun, Principal Sudder Ameen of that district, dated 15th December 1857.

Cases Nos. 602 to 607 of 1858.

The Collector of West Burdwan, (Defendant,) *Appellant,*
versus

Mr. J. E. Skin, (Plaintiff,) *Respondent.*

Baboo Ramapersad Roy, for Appellant.

Moonshee Ameer Alee, Mr. R. T. Allan, and Baboos Taruknath Sein and Jugudanund Mookerjee, for Respondent in the first three cases.

Baboos Taruknath Sein and Jugudanund Mookerjee and Mr. R. T. Allan, for Respondent in the last three cases.

THESE cases were admitted to special appeal on the 22nd September 1858, under the following certificate recorded by Messrs. H. T. Raikes and J. H. Patton.

"The petition of special appeal is on the part of the Government, claiming to be made a party in a suit brought by a zemindar to

certain land confessedly belonging to the zemindars of which he holds the putnee lease, on the allegation that they have been usurped by the ghatwal, and are in excess of the quantity to which he is entitled, and in which the ghatwal does not deny that the lands are within the plaintiff's putnee lease, Government can have no claim *directly* to the lands, as they were included in the zamindari at the time of the decennial settlement; but in consequence of the *indirect* interest which Government has in the land, an interest arising from the nature of the service which the tenants perform, and the power which, through custom, Government has long exercised as to their dismissal and appointment, Government is entitled to be made a party to them.

Held also, that this interest is not, in a legal sense, an interest adverse to the zemindar, but it is such a material though indirect interest as, in accordance with the general rule, which lays down that all persons materially interested in the subject matter in dispute ought to be made parties to a suit, in order that complete justice may be done and the question quieted, requires that Government should be made a party in cases like that before the Court.

Case remanded for re-investigation by the principal sudder ameen, with directions that that officer allow plaintiff a reasonable time to file supplemental plaints, making Government a party, and then accept the answer filed by Government, and pass eventually whatever decision may seem just and proper.

Held that, in suits brought by a putneedar, standing in the place of a zemindar, to recover possession of

recover possession of certain lands appropriated by a ghatwal in Bancoorah.

"The principal sudder ameen nonsuited the zemindar, holding the Government to be a necessary party to the suit.

"In appeal, the judge, after recording an elaborate opinion upon many other points, but upon the one of nonsuit, merely remarking that the spontaneous appearance of the Government was sufficient, has remanded the case for trial on its merits.

"We admit the special appeal, to try whether the suit, being one to recover possession of lands, in deciding which it must be determined whether the lands in suit belong to the ghatwalee tenure or not, should be tried in the presence of the Government or not.

"If so, the spontaneous appearance of the Government cannot be sufficient, for under such appearance the Government can tender no evidence in support of its allegations.

"The applications Nos. 605 to 607 are also admitted, that they may follow the decision in this case."

JUDGMENT.

There can, we think, be no doubt but that, in a suit like the present, which is brought by a putneedar standing in the place of the zemindar to recover possession of certain lands, confessedly belonging to the zemindaree of which he holds the putnee lease, on the allegation that they have been usurped by the ghatwal, and are in excess of the quantity to which he is entitled, and in which the ghatwal does not deny that the lands are within plaintiff's putnee lease, Government can have no claim *directly* to the lands. They having, at the time of the decennial settlement, been included within the zemindaree in which they are situated, are of course covered by the assessment then made on the estate. But the question before us is whether, in consequence of the *indirect* interest Government has in the land, as being held on a service tenure intimately connected with the peace and protection of the country, Government should not, in suits like the present, be made a defendant.

It is not necessary, nor, sitting in special appeal, is it admissible for us, if the materials were before us, to enter upon an account of the origin and nature of the ghatwalee tenures in Bancoorah. At the present time, however, it is notorious that, whether the tenures were originally hereditary or not, Government has, for a long series of years, exercised the power of dismissing ghatwals for various causes, and in some instances of appointing their successors; that the registry of the ghatwalee lands has been kept up by Government in a more complete and perfect manner than by any one else; and that thus Government has acquired a clear

interest in seeing that the ghatwalee lands are not intruded on by any party, and also is in possession of the best evidence of the extent of those lands.

This interest is one not adverse in a legal sense to the zemindar ; but it is such a material though indirect interest, that we think, in accordance with the general rule, which lays down that all persons materially interested in the subject matter in dispute ought to be made parties to the suit, in order that complete justice may be done and the question quieted, Government ought to be made a party in cases like those now before us.

The spontaneous appearance of Government is not, as ruled by the judge, sufficient ; for this appearance gives Government no right to be treated as a substantial party to the suits in which it is made, and, consequently, gives Government no right to have its pleas heard and determined after evidence has been taken upon them.

Under this view of the subject we reverse the orders of the judge passed in the six cases now before us, and, instead of affirming the order of the lower court, nonsuiting the plaintiff, we remit the cases to the judge, with directions that he will remand them to the principal sudder ameen, instructing that officer to allow plaintiff a reasonable time to fill supplemental complaints, making Government a party ; that he will then accept the answers filed by Government, and, after having attentively considered the evidence produced by both parties before him, pass whatever decision may seem just and proper.

THE 30TH APRIL 1859.

C. B. TREVOR, ESQ., Judge, and E. A. SAMUELLS and G. LOCH, ESQS.,
Officiating Judges.

Regular Appeals from the decisions of Moonshee Naziroodeen Khan, Principal Sudder Ameen of Behar, dated 30th December 1856.

Case No. 252 of 1857.

Khajah Abool Hossein Khan *alias* Hossein Jan and another,
(Plaintiffs,) *Appellants*,

versus

Maharajah Heetnarain Singh, (Plaintiff,) and others, (Defendants,)
Respondents.

Baboo Kishenkishore Ghose and Moulvee Murhumut Hossein,
for Appellants.

Baboo Ramapersad Roy and Moonshee Ameer Alee, for Respondents.

Suit laid at Rupees 6713-15.

Case No. 254 of 1857.

The same parties.

Moulvee Murhumut Hossein, for Appellants.

Moonshee Ameer Alee and *Baboo Unnodapersad Banerjee*, for Respondents.

Suit laid at Rupees 20,967-15-4.

Case No. 256 of 1857.

The same parties.

Moulvee Murhumut Hossein, for Appellants.

Baboo Ramapersad Roy and *Moonshee Ameer Alee*, for Respondents.

Suit laid at Rupees 1,65,919-5a-4p-8k.

Case No. 253 of 1857.

Khajah Abool Hossein Khan alias Hossein Jan and another,
(Plaintiffs,) *Appellants*,

versus

Maharajah Heetnarain Singh, (Defendant,) *Respondent*.

Moulvee Murhumut Hossein, for Appellants.

Mr. R. T. Allan and *Moonshee Ameer Alee*, for Respondent.

Suit laid at Rupees 6692-10-6.

Case No. 255 of 1857.

The same parties.

Moulvee Murhumut Hossein, for Appellants.

Moonshee Ameer Alee and *Aftaboodeen Mahomed*, for Respondent.

Suit laid at Rupees 7083-3-9.

ON the 6th Srabun 1247 Fuslee, *Khajah Hossein Ali Khan* a Mahomedan, who succeeded to his property, but fraudulently pleaded renunciation of inheritance in order to baffle their father's creditors, held personally liable, though with liberty to prove, if they can, in execution of decree, that any property which the creditors may attach was not inherited from their father or acquired with funds derived from him. It is the duty of a Mahomedan heir to marshal the effects and pay the debts of the person whose property he inherits, before he applies it to any other purposes; and, if he fails to do this, he places himself in the position of a wrong-doer and incurs a personal liability.

The heirs of *ON* the 6th Srabun 1247 Fuslee, *Khajah Hossein Ali Khan* a Mahomedan, who succeeded to his property, but fraudulently pleaded renunciation of inheritance in order to baffle their father's creditors, held personally liable, though with liberty to prove, if they can, in execution of decree, that any property which the creditors may attach was not inherited from their father or acquired with funds derived from him. It is the duty of a Mahomedan heir to marshal the effects and pay the debts of the person whose property he inherits, before he applies it to any other purposes; and, if he fails to do this, he places himself in the position of a wrong-doer and incurs a personal liability.

1251, which had fallen into arrears. This was settled for the time by a part payment and a razeenamah, whereby the defendant covenanted to make good the balance; but when Hossein Ali Khan died in Jeyt 1254 (May 1847), a portion of this balance and considerable arrears for other years were still due.

Khajah Hossein Ali Khan left three sons, Khajah Talib Ali Khan *alias* Sooltan Jan, Khajah Abool Hossein Khan *alias* Hossein Jan, and Khajah Mahomed Hossein Khan *alias* Meerun Jan (the two latter of whom are the present appellants), and one daughter, Mussumat Pootee Begum.

These parties having failed to make any arrangement with the plaintiff for the payment of the arrears, the latter attached the mehals and realised the rents direct from the ryots. Sheikh Anwaroolah and Sreechund, who had obtained a kutkina lease of the mehals from Hossein Ali Khan, sued however in the magistrate's court, under Act IV. of 1840, to recover possession, and were successful. In this suit they were supported by the heirs of Khajah Hossein Ali Khan, who have been mentioned above.

The plaintiff then instituted two summary suits against the Khajah's heirs as ticcadars, and against the kutkinadars; one for the rent due from the commencement of Cheyt to Assar 1254, that is, up to the Khajah's death, or a few days beyond it, and the other for the kists from Assin to Aghrun 1255.

The defendants did not deny possession, but they disputed various items of the account; and in the decrees, which the plaintiff obtained on the 29th February and 1st of March 1848, considerable deductions were, in consequence, made from the amount of the plaintiff's claim.

The plaintiff next instituted an action in the zillah court against the heirs of Khajah Hossein Ali Khan and the kutkinadars for the general balance due by Khajah Hossein Ali Khan, for the years 1243 to 1253 inclusive, and for recovery of the deductions allowed by the deputy collector in the two summary suits abovementioned.

This case was nonsuited for multifariousness by the principal sudder ameen on the 11th December 1851, and the plaintiff, therefore, in the months of January and February 1852, instituted three separate suits. The first (No. 252) for amendment of the two summary decrees of 1848, and recovery of the sums therein disallowed, valued at rs. 6713-1-5. The second (No. 254) for recovery of the balance of rent of the year 1251, amounting, with interest, to rs. 20,967-15-4-16, as per a razeenamah executed by Khajah Hossein Ali Khan, under which a former suit for this rent was compromised; and the third (No. 256) for rs. 1,65,919-5-4-8, being balance of rent, with interest, from the year 1243 to 1253, with the exception of 1251.

In the month of July 1854, the heirs of Khajah Hossein Ali Khan, together with the kutkinadars, also filed two suits (253 and 255), for the purpose of obtaining a reversal of the summary decrees of the 29th February and 1st March 1848.

These are the five suits now before the Court.

In their suits and in their answers to the plaintiff's suits, the heirs of Hossein Ali Khan allege that the eldest brother, Talib Ali Khan, alone succeeded to the property of his father, and that Mahomed Hossein and Abool Hossein, with their sister, Pootee Begum, never intermeddled with his assets, and are not consequently liable for his debts. On these grounds the three last claim exemption, while Talib Ali, admitting that he is liable for his father's debts, challenges the correctness of the plaintiff's accounts, and urges various grounds for a reduction of his claims. The kutkinadars also plead exemption, on the ground that their contract was with the ticcadar; that they have paid him and his heir, Talib Ali; and that they are not liable to be sued by the zemindar.

During the pendency of the suit Talib Ali died, and the plaintiff substituted his widow and daughters as defendants, alleging them to have succeeded to his property, which, however, they denied.

The principal sudder ameen discharged these ladies and also the kutkinadars from liability, and gave a decree, after investigation of the accounts, for the full amount of the plaintiff's claim, against the estate of Talib Ali Khan, and against Mahomed Hossein, Abool Hossein, and Pootee Begum personally, holding their plea of non-acceptance of their inheritance to be completely disproved, and observing that, in consequence "of their not specifying the extent of the effects in their possession, and fraudulently pleading disconnection and exemption, their liability cannot be proportioned to the effects held by them."

Against this decision two of the defendants, Mahomed Hossein and Abool Hossein, have appealed, contending, 1st, that it has not been established by the evidence that they succeeded to any portion of their father's property; and, 2nd, that in any case the decree against them should, in conformity with the Mahomedan law, have been limited to such assets of Hossein Ali Khan's as might be traced to their possession.

Baboo Kishenkishore Ghose, who appeared for the appellants, contends that his clients never received any portion of their father's property, and, consequently, are not liable, under the Mahomedan law of inheritance, for his debts; moreover, that they have entered into no engagements with the plaintiff for the farming lease of the mehals, on which the present claims are founded, are wholly unconnected with this lease, and are not, therefore, responsible for the arrears of 1255.

In support of these pleas, reference has been made to two summary orders and one decision of the zillah courts. The first is an order of the principal sudder ameen of Behar, dated the 30th June 1851, which was upheld by the judge on the 31st December 1852, permitting Talib Ali Khan to appear as heir on the demise of Khajah Hossein Ali Khan, and to execute a decree which the latter had obtained against the present plaintiff, Rajah Hetnarain Singh. It seems, however, that in that case the Rajah's objection, that Hossein Ali Khan had left other heirs, was not made the subject of investigation; and it was clearly a matter of little consequence to the present plaintiff, whether the court allowed one or more of his creditor's heirs, to receive the amount which had been decreed against him.

The second order, to which the appellants refer, was passed by the additional judge of Behar, on the 2nd September 1850, and confirmed an order of the principal sudder ameen of the same district, dated the 23rd August 1849, in which that officer directed execution of a decree, for which Khajah Hossein Ali Khan had been liable, to be taken out against Talib Ali Khan alone, on the ground that, by a certain ikrar of the 5th of July 1847, and a solehnamah of the 18th November in the same year, it appeared that the other heirs of Khajah Hossein Ali Khan had made over the whole of their father's property to Talib Ali, with the exception of certain houses and villages specifically mentioned, and were, consequently, not liable for his debts.

The plaintiff was no party to this suit, and the ikrar and solehnamah alluded to in the principal sudder ameen's roobukaree have not been filed, nor have the appellants pleaded them. Their plea in the present case is a simple denial of the receipt of any assets whatever, and is directly at variance with the terms of the agreements on which the principal sudder ameen's order in the case cited was founded. That order, therefore, cannot avail them in the present suit.

The decision of the principal sudder ameen of Patna, of the 5th April 1855, in a suit by Lootf Ali Khan against the heirs of Khajah Hossein Ali Khan, was adduced by the appellants in the court below, but was not relied on here, as it had been reversed on appeal by this Court, on the 26th of March 1858, and an application for review of judgment was rejected on the ensuing 5th August.

This decision of the 26th of March disposes conclusively of the appellants' first plea. It was then held by the Court that it was evident, from the fact of the execution of the solehnamah, that the respondents had succeeded to the property of their father, otherwise they could not have disposed of it; and also that they were in possession of portions of that property, and are, consequently,

liable for the debt to the extent of the property which they retained in their possession. And in the review of judgment, it was ruled that the property "which the petitioners (present appellants) have received from their ancestor, the original debtor," might be brought to sale.

The decision of the Court in the case of Lootf Ali Khan was founded on the admissions in the solehnamah, which the defendants in that case, (though it is admitted they did not produce it,) appear to have pleaded; but the plaintiff in the present suit has carried the case against the appellants much further. He shows that, in the proceedings before the magistrate and sessions judge, which commenced in August, terminated in November 1847, and were afterwards revived in 1852, consequently, after the date of the alleged ikrar and solehnamah, Talib Ali Khan and the appellants appeared in court as heirs of the ticcadar, Talib Ali, describing himself as owner of his own share and that of his sister, Pootee Begum, and the appellants generally as heirs of their deceased father, and obtained an order, in which their possession as ticcadars was recognised.

That in the summary suits, decided in 1848, from which the appellants' present suits are in the nature of appeals, the appellants contented themselves with disputing the items of the plaintiffs' account, and raising technical objections, but never once pleaded the ikrar and solehnamah, or asserted that they had not succeeded to the property for the rent of which they were sued.

That on the 7th December 1847 they recovered a debt of ra. 700, due to their late father, in the sudder ameen's court, where they appeared as the heirs of the deceased.

That on a suit (decided on the 17th July 1851) being instituted by the plaintiff, against one Ameeroonissa Begum, to set aside a mokurruree lease, Talib Ali appeared on the part of the Begum, and pleaded that the suit was defective, in consequence of Abool Hossein, Mohamed Hossein, and Pootee Begum, the heirs of Khajah Hossein Ali Khan, not having been made defendants, upon which the plaintiff included these persons by a supplementary plaint, and the present appellants appeared and filed their answer, in which they contested the plaintiff's claims, and supported Ameeroonissa, and that costs in that case were awarded against them.

The strong evidence which these proceedings afford, of the appellants having succeeded to the ticca farm rented from the plaintiff, by Hossein Ali Khan, and of their having administered generally to their father's estate, is met by a feeble suggestion that Talib Ali Khan may have used the names of the appellants without their sanction; but there is no proof of this whatsoever, and it is so clearly opposed to the interest of Talib Ali Khan, in

the majority of the cases referred to, that we have no hesitation in rejecting the supposition as altogether improbable.

It being decided then, that the appellants did succeed to the estate of their father, the only question which remains for consideration is, whether the decree, which must issue against them, shall be limited to the assets which they have inherited, or whether, adopting the view of the case which the principal sudder ameen has taken, we shall give a personal decree against the appellants, on the ground that, by the fraudulent plea which they have set up, they have rendered it impossible for the Court to determine what the amount of the assets was.

The course, which, after mature consideration, we have decided on adopting, will be an intermediate one, and will have the effect of throwing the onus of proof of the origin of the assets in their hands on the heirs, and compelling them, if they think that thereby they can escape any portion of their liabilities, to do now what they should have done at first, and to exhibit clearly and fully their dealings with their father's property.

The ordinary rule of Mahomedan law is, that "heirs are answerable for the debts of their ancestors as far (only) as there are assets." Numerous passages in *Macnaghten's Precedents of Mahomedan Law*, however, show that it is the duty of the heirs, on the decease of the ancestor, to marshal his effects and to provide for the payment of his debts before they appropriate any portion of the inheritance. The general principle is thus laid down in section 5, chapter I. of Macnaghten's work: "Debts are claimable before legacies, and legacies (which however cannot exceed one-third of the testator's estate) must be paid before the inheritance is distributed."

In case lix., page 128, this principle is thus expounded: "On the death of the proprietor, his estate, whether real or personal, should, in the first instance, be applied to defray his funeral expenses; in the second place, to the discharge of his debts; and, in the third place, to the payment of his legacies out of a third of the residue of the property. What remains should be divided." And in case viii., page 88, we have a similar exposition: "If the debtor left property at his death, the creditor may claim his debt from the heir of the deceased, who has become possessed of the property left, and the debts of a deceased person must be liquidated before claims of inheritance can be satisfied. If the amount of the property exceed the amount of the debts, the heirs will share the residue; but if the property fall short of the amount of the debts, the whole of it must be appropriated to their liquidation."

Now, it cannot be said in this case, that the appellants were not aware of the debt due by their father to the plaintiff; for it had partially at least been the subject of a suit not long previous to the father's death; and it is in evidence that the plaintiff, immediately

after that event, forcibly attached the mehals which Hossein Ali Khan had farmed, for the purpose of realising his dues. In appropriating the inheritance and distributing it, without providing for the payment of their father's debts, there is no doubt, therefore, that the appellants have placed themselves in the position of wrong-doers. They have violated that rule of the Mahomedan law, which seems to have been expressly intended for the protection of creditors against the risks to which they would otherwise have been exposed, from the practice of confining the liability of heirs to the amount of assets they have received. Not only have they done this, but they have set up a fraudulent plea of renunciation of inheritance, with a view of still further baffling the creditor with whom it was their duty to have settled on their father's death.

We do not, therefore, consider that they are in a position to claim exemption from a personal decree. They have intermeddled illegally with assets which ought to have been devoted to the payment of their father's debts, and must take the consequences. The heir of a Mahomedan has his duties as well as his privileges, and cannot be allowed to claim the one without fulfilling the other. The appeals of Mahomed Hossein and Abool Hossein will, consequently, be dismissed, and the decision of the principal sudder ameen affirmed, with costs. The respondent may proceed against any property of these parties that he thinks fit, whether personal or otherwise, but having regard to the general principles of the *Mahomedan Law of Inheritance*, which do not award to a creditor any thing beyond the assets of his deceased debtor, we think it right to direct that, in execution of decree, the appellants shall be entitled to prove, if they can, that the property attached was neither an asset of their father nor acquired with funds derived from him. This order will not, however, apply either to the portion of the decree in case No. 252, which refers to the arrears of rent adjudged for the period subsequent to the death of Hossein Ali Khan, or to the plaintiff's claim for interest on the debt from the date of the father's death.

THE 30TH APRIL 1859.

C. B. TREVOR, ESQ., Judge, and E. A. SAMUELLS and G. LOCH, ESQS.,
Officiating Judges.

Regular Appeals from the decision of Captain G. Verner, Superintendent of Cachar, dated 4th June 1856.

Case No. 319 of 1857.

Gholam Hossein Chowdhree, (Defendant,) *Appellant,*
versus

Sufdurmeah and others, (Plaintiffs,) *Respondents.*

Baboos Sreenath Dass and Unnodapersad Banerjee, for Appellant.
Baboos Baneemadhub Banerjee and Kaleeprosunno Dutt, for Respondents.

Case No. 320 of 1857.

Sufdurmeah and others, (Plaintiffs,) *Appellants,*
versus

Gholam Hossein Chowdhree and others, (Defendants,) *Respondents.*
Baboos Baneemadhub Banerjee and Kaleeprosunno Dutt, for Appellants.

Suit laid at Rupees 98-0-0.

PLAINTIFFS sued to recover the value of an elephant and its hire from the defendant Gholam Hossein. They allege that, in Maugh 1260 B. S., Gholam Hossein hired their elephant to drag logs of wood from the jungle, and agreed to pay them as hire for the use of the elephant one-third of the logs so obtained; that, having a dispute with Nukeameah and Sonameah about some land, they instigated the defendant Gholam Hossein to destroy the elephant, which he did; that they, plaintiffs, brought charges against them for so doing in the magistrate's court, but their case was dismissed, and they were referred to the civil court; and that when that case was pending, the defendants offered to settle with them for rs. 1300, and deposited a part of the sum with Sathooram Shah, which they afterwards took back; that, being unable to ascertain the quantity of wood dragged by the elephant, plaintiffs have calculated the hire at rs. 2 per diem for the period the elephant was in the possession of the defendants.

Plaintiffs sued to recover the value of an elephant hired from them by the defendant, Gholam Hossein, which elephant plaintiffs declared had been wantonly destroyed by the said defendant. As plaintiffs were unable to prove the charge of wanton destruction, the claim against this defendant was dismissed. Also, a claim for hire, at a certain rate per diem, was dismissed, as the claim was calculated contrary to the terms of his alleged contract with the plaintiffs.

The defendant Gholam Hossein, for himself and Abdool Mujeed, denies having hired the elephant, and states that Doolahmeah Lushkur and Needhoomeah Chowdhree hired the elephant, and took it into the jungles, where it escaped, and that this suit has been brought against them from ill-will. Objections are also raised by the defendants to the value put on the elephant by the plaintiffs, and the rate of hire claimed.

Doolahmeah and Needhoo Chowdhree, made defendants by the plaintiffs, because they deposed before the magistrate that they had hired the plaintiffs' elephant, file no answer, but have been examined on oath, and admit that they hired the elephant on the terms mentioned by the plaintiffs, and that it escaped into the jungle.

The commissioner of Cachar rejected the plaintiffs' claim to hire as being contrary to the terms of the contract. He considered the evidence to the destruction of the elephant by Gholam Hossein unworthy of credit, but, holding it to be proved by the evidence that Gholam Hossein had hired the elephant, he made him and the two defendants, Doolahmeah Lushkur and Needhoo Chowdhree, who admitted that they had hired it, responsible for the value of the elephant.

Two appeals have been preferred from this decision, one by the plaintiffs against so much of the order as rejected their claim for hire, and the other by the defendant Gholam Hossein, objecting to being made liable for the value of the elephant, which was not hired by him, but by his co-defendants Doolahmeah and Needhoo Chowdhree, who have not appealed.

The plaintiffs charge the defendant Gholam Hossein with having, at the instigation of third parties, wantonly destroyed their (plaintiffs') elephant, which the defendant had hired, and plaintiffs bring evidence to prove their charge. This evidence we think utterly unworthy of credit, and, consequently, the claim against this defendant, based as it is on his having destroyed the elephant, falls. Had plaintiffs claimed the value of the elephant, because it was lost or injured through defendant's neglect, while in his custody, it would have been necessary to enter into the points raised by the appellant's counsel, as to the defendant's liability as the hirer, and whether the animal was lost through his neglect; but when the plaintiffs have pleaded one thing, *viz.* that the elephant was wantonly destroyed by the defendant, they cannot, when this plea fails, claim to recover the value on another ground, *viz.* that the defendant hired the animal and has not returned it. A somewhat similar case to the present is reported at page 1478 of the Reports of 1857. In that case the defendant was charged with having poisoned the plaintiff's elephant, but, failing to prove the fact of poisoning, the claim was dismissed. In the present case also we think that, the charge of wanton destruction of the elephant having failed, the claim against Gholam Hossein should be dismissed. We place no reliance on the evidence adduced to prove that the defendant was anxious to settle the case for rs. 1300, and had made a deposit of part of that sum, for, if the elephant were worth only rs. 800, it is unlikely that defendant should have offered rs. 1300 to make a settlement.

We agree with the lower court in thinking that the plaintiffs' claim for hire is not admissible. Their contract was for a share of the wood dragged by the elephant ; and they could have ascertained from their mahout, who remained in charge of the elephant, and from the defendants Doolahmeah and Needhoo Chowdhree, who admit that it was at work for twelve days before it made its escape, what quantity was obtained. Plaintiffs cannot now, in opposition to the terms of their contract, sue for hire at a particular rate per diem. We dismiss the plaintiffs' appeal, with costs, and decree the appeal of Gholam Hossein, with costs.

THE 30TH APRIL 1859.

C. B. TREVOR, ESQ., Judge, and E. A. SAMUELLS and G. LOCH, ESQS.,
Officiating Judges.

Regular Appeals from the decision of Baboo Govindchunder Chowdhree, Principal Sudder Ameen of Moorshedabad, dated 30th June 1854.

Case No. 437 of 1854.

The Collector of Moorshedabad, (Defendant,) *Appellant*,
versus

Ranee Kistomonee Debea and others, (Plaintiffs,) *Respondents*.

Baboo Ramapersad Roy, for Appellant.

The Advocate General, Mr. J. W. B. Money, Moonshee Ameer Alee, and Baboos Unnodapersad Banerjee and Unookoolchunder Mookerjee, for Respondents.

Case No. 438 of 1854.

Kasheesoonderee Debea, (Defendant,) *Appellant*,
versus

Ranee Kistomonee Debea and others, (Plaintiffs,) *Respondents*.

Baboos Ramapersad Roy, Kishenkishore Ghose, and Sreenath Dass, and Mr. H. V. Doyme, for Appellant.

The Advocate General, Messrs. A. T. Peterson and J. W. B. Money, Moonshee Ameer Alee, and Baboos Shumbhoonath Pundit, Ashootosh Chatterjee, Unookoolchunder Mookerjee, and Unnodapersad Banerjee, for Respondents.

Case No. 439 of 1854.

Ranee Kistomonee Debea, (Plaintiff,) *Appellant,*
versus

The Collector of Moorshedabad and others, (Defendants,) *Respondents.*

The Advocate General, Messrs. A. T. T. Peterson and J. W. B. Money, Moonshee Ameer Alee, and Baboos Shumbhoonath Pundit, Ashootosh Chatterjee, Unookoolchunder Mookerjee, and Unnodapersad Banerjee, for Appellant.
Baboos Ramapersad Roy and Bungsheebuddun Mitter, and Messrs. R. T. Allan and H. V. Doyne, for Respondents.

Suit valued at Rupees 3,10,394-14a.-13g.-8k.-1k.

Held, that the validity of the permission to adopt, alleged to have been executed by Rajah Gobindchunder in favor of his wife Shivessuree Debea, was by the pleadings in this case put in issue, but that, on the authenticity and genuineness of that deed, as well as on the validity of the subsequent adoption of Gobindnath Roy, no clear and distinct adjudication has been pronounced.

THIS case was first heard by the Court on the 30th June 1857, and on the 19th December of the same year the Court granted a review of its judgment on the motion of Ranee Kistomonee Debea, the plaintiff in the court below and appellant to this Court.

The review was granted on the following grounds: 1st, inasmuch as it appears doubtful whether the validity or otherwise of the permission to adopt, executed by Gobindchunder in favor of his wife Shivessuree, was by the pleadings in this case put in issue or not; 2nd, inasmuch as, if it were put in issue, it would seem to have been put in issue in such a halting and unsatisfactory manner as, with reference to the circumstances of this case, to render a remand necessary, in order that both parties may file all the evidence, both documentary and oral, in their possession, bearing on the point at issue, and a clear and explicit determination may be come to on the point by the court below, aided by the advantage of all procurable evidence; 3rd, inasmuch as, if this point were *not* in issue, the Court should at once proceed to enquire into the remaining points at issue between the parties to the suit; and, 4th, inasmuch as, if the points were in issue, it is necessary to consider whether the points on which the evidence seems to have been misapprehended by the Court, are of

decision, sufficiently strong and explicit to allow of the Court's coming to the conclusion, that a waiver of the question of the validity of Gobindnath's adoption had been made by the vakeels of the defendants in this case, and that, although it was competent to vakeels in court to waive any point pleaded by them, if they considered it for the benefit of their client so to do, still such a waiver, especially when it is the abandonment of a written plea, must be clear and distinct, beyond a possibility of doubt.

Held, that a valid regular judgment in this country upon the *status* of an alleged adopted son is a judgment *in rem*, and as such conclusive and final against all the world; and that a summary adjudication of the same nature, though not conclusive, is *prima facie* proof of the fact adjudicated sufficient to throw the burden of disproving the same on the opposite party.

Held, also, that the proceeding of the judge of Rajshahye, dated 20th June 1837, or 9th Assar 1244, did not refer to the adoption of Gobindnath Roy ten years after its date, but only to the permission to adopt, alleged to have been executed by Rajah Gobindchunder, and, consequently, it was in no sense a judgment upon the *status* of Gobindnath Roy.

Cases in appeal remanded to the judge of Rajshahye, for re-investigation by him.

sufficient importance as, when corrected, in any degree to cause a modification of the Court's previous judgment.

After hearing the counsel and pleaders engaged on both sides at great length, we have come to the determination that the validity of the permission to adopt, alleged to have been executed by Rajah Gobindchunder, in favor of his wife Shivessuree Debea, was by the pleadings in this case put in issue; that, on the authenticity and genuineness of that deed, as well as on the validity of the subsequent adoption of Koonwur Gobindnath Roy, no clear and distinct adjudication, after the production of all available evidence by both parties, has been pronounced; and that, for the purpose of a clear determination of these points, the appeals must be remanded.

It is unnecessary here to remark on those arguments which were urged before the Court in repetition of previous arguments on the same point, urged when the application for review was before the Court. One or two new points were, however, urged by the learned counsel for the plaintiff, petitioner, Rancee Kistomonee, on which it is necessary to make a few observations.

On turning to the decision of the principal sudder ameen, it appears that the first issue laid down by that officer was, whether this suit, instituted by the plaintiff in virtue of her guardianship of the minor, Gobindnath Roy, can be accepted or not, and the fourth was, whether the adoption of Gobindnath, the minor, is lawful or not.

In considering the first issue, the principal sudder ameen observes: "That the deed of permission to adopt, executed by Gobindchunder Roy, and dated 25th Aghrun 1243 B. S., has been clearly proved by the deposition of witnesses, Shitul Raha and Khoodiram Koberaj; and in this deed it is clearly mentioned that the plaintiff was appointed guardian to the minor to be adopted; moreover, by consulting the roobukaree of the judge of zillah Rajshahye, under date the 21st June 1837, it appears plain that there was a deed of permission executed by Gobindchunder, dated 25th Aghrun 1243 B. E., and that this deed spoke of the plaintiff as being appointed guardian to the minor." The first issue in bar was, therefore, answered in the negative by the principal sudder ameen, essentially in the negative, though formally in the affirmative.

In a subsequent portion of his judgment, the principal sudder ameen observes: "That, on entering into the merits of the case, the pleaders of both parties did not raise any dispute concerning the fourth issue. The opinion of the court, therefore, regarding the above issue, is that, from the copy of the roobukaree of the judge of Rajshahye, dated 21st June 1837, the deed of permission, dated 25th Aghrun 1243 B. E., mentioned above, and copy of a petition of information, dated 19th Bhadro 1255, it appears plain that Gobindchunder, the father of the minor, gave to his wife Rancee Shivessuree

a permission to adopt, and the Ranee Shivessuree has adopted Gobindnath as her minor son, and has given notice of the same to the court of zillah Rajshahye."

It has been contended by the learned advocate general that, as, according to the statement of the principal sudder ameen, the vakeels of the other side raised no contest on the point of Gobindnath's adoption, they must be considered to have waived any objection that may have been urged against it in the pleadings of the case; that, consequently, the principal sudder ameen was quite wrong in giving any opinion himself upon a point which, on the supposition of waiver, was not in contest, but should have proceeded at once to the other issue raised in the case.

Now, without questioning the general principle, that it is competent to vakeels in court to waive any point pleaded by them, if they consider it for the interest of their clients so to act, we think that the words of the principal sudder ameen do not convey the meaning which the advocate general would assign to them. In the remarks made by the court on the first issue in bar, the deed of permission alleged to have been executed by Rajah Gobindchunder is mentioned, and its genuineness declared to be established; and in accordance with that permission, the minor, Koonwur Gobindnath, is alleged by the plaintiff to have been adopted. We think, therefore, that the words of the principal sudder ameen simply means that, as to the particular adoption of Gobindnath, the vakeels had no argument in addition to those previously adduced to offer on the fourth issue coming before him; he therefore proceeded to give his opinion forthwith in favor of the validity of that adoption.

This view, derived chiefly from an attention to the words used by the principal sudder ameen, is confirmed by a consideration of the subject matter to which those words refer. The main point at issue was the genuineness of the deed of permission; that proved, the validity of every thing done under it follows almost as a matter of course; in other words, the deed of permission to adopt being proved, slight evidence is sufficient to support the adoption made under it; and it is probable that, partly on this ground, and partly on the ground that the argument for the adoption had been mixed up with those in favor of the deed of permission, the vakeels desisted from further contention. Be that, however, as it may, we are quite clear that the words of the principal sudder ameen do not evidence that clear abandonment by the vakeels of the defendant of a written plea which, in a matter like the present, is necessary to constitute a legal waiver.

Again, it was contended by Mr. Money that, granting that the genuineness of the deed of permission alleged to have been executed by Rajah Gobindchunder to his wife Ranee Shivessuree, and the

adoption of Koonwur Gobindnath being made under it, had been put in issue and not waived, both points had been proved by the plaintiff in the suit ; that the order of the judge of Rajshahye, dated the 21st June 1837, was in the nature of a judgment *in rem*, that an adjudication pronounced upon the *status* of some particular subject matter by a court having competent authority for that purpose, though summary in its nature, and, therefore, not conclusive on the point adjudicated in it, was valid until reversed by a regular suit ; that it had never been reversed, and, consequently, looking to its date, was *prima facie* evidence of the very strongest kind of the authenticity of the deed of permission, and the subsequent adoption under it—evidence under the circumstances sufficient to entitle the plaintiff to a decree, unless the other side could produce evidence to rebut it ; that they had produced no evidence of this nature, and therefore there was evidence at present on the record sufficient to establish the plaintiff's case on both the points above noted.

As we have determined to remit the case, we think it inexpedient to consider and lay down at present the particular weight to be given to the proceeding of the judge of Rajshahye, dated 21st June 1837, or 9th Assar 1244 B. E. We would simply observe that that proceeding only refers to the permission to adopt, alleged to have been executed by Rajah Gobindchunder Roy, and is altogether silent as to the adoption of Gobindnath Roy, an adoption which, in fact, took place ten years subsequently, that is, in 1254 B. E., and that, consequently, it can in no sense be considered as a judgment upon the *status* of that person. Had it been a clear though summary adjudication upon the *status* of the alleged adopted son, it would, of course, looking to its nature and its date, though not conclusive, have been a very strong document in favor of the person regarding whom the adjudication was passed : for there can be no doubt that a valid regular judgment in this country, upon the *status* of an alleged adopted son, is a judgment *in rem*, and as such conclusive and final against all the world ; and a summary adjudication of the same nature, though not conclusive, is *prima facie* proof of the facts adjudicated sufficient to throw the burden of disproving the same on the opposite party.

Satisfied, therefore, that full enquiry upon the main points in contention between the parties has not taken place, we have come to the conclusion, as before observed, that these appeals must be remitted for re-investigation. When considering regarding the remand of these cases, and another case from [Rajshahye, in which the same essential points have been put in issue, it was urged upon us by both parties that it would be not only advantageous for the ends of justice, but convenient to all the litigants, if all these cases were remitted to the judge of Rajshahye, with instructions to put them on his own file and determine them himself. Looking to the importance

of these cases to the parties concerned, the magnitude of the interests involved, and the alleged convenience of the parties, we have no hesitation in acceding to the suggestion of the parties before us. We therefore remit these three appealcases to the judge of Rajshahye, with directions that he will place them on his own file, take them up out of their order on it, and with as little delay as possible frame fresh issues, involving the genuineness and authenticity of the deed of permission alleged to have been granted by Rajah Gobindchunder to his wife Shiveesuree, and the validity of the adoption of Koonwur Gobindnath Roy made under that permission, and all the other points in contest between the plaintiff and the defendant in the suit; that he will then call upon them to produce any further evidence, either documentary or oral, that they may have to produce in support of their different contentions, and will then, after considering the whole evidence in the case, and giving to each piece of evidence the weight to which it is entitled, pass whatever decision the justice of the case may seem to him to require.

THE 30TH APRIL 1857.

C. B. TREVOR, Esq., Judge, and E. A. SAMUELLS and G. LOCH, Esqs.,
Officiating Judges.

Case No. 801 of 1857.

*Regular Appeal from the decision of Mr. L. S. Jackson, Judge of
Rajshahye, dated the 17th August 1857.*

Ranee Kistomonee Debea, guardian of Koonwur Gobindnath Roy,
minor, (Plaintiff,) *Appellant,*
versus

Rajah Anundnath Roy, (Defendant,) *Respondent.*

The Advocate General, Messrs. A. T. T. Peterson, J. W. B. Money, and R. T. Allan, Baboos Shumbhoonath Pundit and Unnodapersad Banerjee, and Moonsee Ameer Alee, for Appellant.

Baboos Ramapersad Roy and Kishenkishore Ghose, for Respondent.

Suit valued at Rupees 1512-8.

Case remitted,
in order that it
may be taken
up and considered
with the
case this day remanded,
and such an order
passed by the
judge as he may
consider just
and proper.

THIS case was, on the 28th July 1856, remanded by this Court to the judge of Rajshahye, with instructions that he would frame an issue to try the question of the minor Koonwur Gobindnath Roy's right to sue through his guardian Ranee Kistomonee Debea, as adopted heir of Rajah Gobindchunder Roy, and that, if this should be established, he would then proceed to try the minor's title as such heir to the lands in dispute, and pass such order as might seem to him just and proper.

In pursuance of these directions the judge of Rajshahye has again taken up the case ; and, relying on a decision of the Court, dated the 30th June 1857, passed in a case in which Rane Kistomonee was plaintiff and Rane Kaseesoonderee Debea and others defendants, which we have this day remitted to the lower court for re-investigation, and, considering himself bound by it, the judge has declared against the validity of the adoption of the minor Koonwur Gobindnath Roy.

As the points for investigation, into which the case, decided by the Court on the 30th June 1857, has been remitted, include that of the validity of the adoption of the minor Gobindnath Roy, it follows that the present decision of the judge, founded upon that judgment, cannot stand ; but that this suit must be remitted also, to be taken up and considered together with the other case which we have this day remanded to him. We, therefore, remit this case to the judge of Rajshahye, directing him to take this suit up when he may have enquired into the *status* of the Rajah Gobindnath Roy, in that already remanded to him, and that he will pass a decision on the point in conformity with the judgment at which he may arrive in that suit.

THE 30TH APRIL 1859.

C. B. TREVOR, Esq., Judge, and E. A. SAMUELLS and G. LOCH, Esqs.,
Officiating Judges.

Case No. 596 of 1858.

Special Appeal from the decision of Mr. F. B. Kemp, Judge of Backergunge, dated 8th January 1858, affirming a decree of Pundit Sreenath Bidyabagish, Principal Sudder Ameen of that district, dated 29th January 1855.

Kaleepersad Sein Chowdhree, (Plaintiff,) *Appellant,*
versus

Nilmadhub Biswas and others, (Defendants,) *Respondents.*

Baboos Kishenkishore Ghose and Dwarkanath Mitter, for Appellant.

Baboos Ramapersad Roy and Shumbhoonath Pundit, for Nilmadhub Biswas, Respondent.

THIS case was admitted to special appeal on the 21st September 1858, under the following certificate recorded by Messrs. C. B. Trevor and H. V. Bayley.

"Plaintiff, petitioner, sued defendants for possession of the southern portion of chuck Kharee Kalee, with mesne profits. He alleges that chuck Kharee Kalee was settled with, and an amulnamah granted to, him, on the 4th January 1840, and a pottah subsequently

Case remanded to the lower court, to ascertain by local investigation the boundary line between the disputed tenures.

in 1842 ; that defendants obtained a settlement and amulnamah of chuck Punchokorun on the 28th April 1841, and a pottah in 1845 ; that quarrels arose regarding certain lands and the boundaries of their respective chucks ; that they entered into a ruffanamah or deed of settlement, arranging their dispute on 17th Cheyt 1249, or 29th January 1843 ; that again disputes arose, and under Act IV. of 1840 plaintiff was dispossessed of land which he held under the ruffanamah ; and he now sues for the land to which he is entitled under the arrangement entered into between the parties.

"Defendants answer, that the land now claimed by plaintiff is within the pottah granted to them by Government according to the boundary of the map of Sreedhur Mookerjee.

"The principal sudder ameen dismissed plaintiff's claim. The judge on appeal affirmed the decree of the principal sudder ameen, holding that plaintiff and defendants, as Government grantees, are bound to respect the boundaries laid down by Government in their respective pottahs, and that the land sued for is clearly within the pottah of defendants.

"Plaintiff now appeals specially, urging that the decision of the judge is defective : 1st, inasmuch as he has not enquired whether the land in dispute was taken possession of by him under the amulnamah granted to him by Government on 4th January 1840, and again under the ruffanamah entered into between him and the defendants in 1843, or not ; and, 2nd, inasmuch as the order of the judge conclusively restricting him to the terms of the pottah subsequently granted to him by Government, although the revenue authorities, when he objected to the boundaries of the pottah, referred him to the civil court to settle his difference with defendant, is contrary both to law and justice, the pottah not being the title itself, but only evidence of a previous title. We admit the special appeal, to try whether, for the reasons urged by petitioner, the decision of the judge is defective or not."

JUDGMENT.

Plaintiff and defendants hold adjoining grants of land in the Soonderbuns. The former received an amulnamah on 4th January 1840, for chuck Kharee Kalee, and a pottah, with defined boundaries, on 17th June 1842. The latter received an amulnamah for chuck Punchokorun on the 28th April 1841, and a pottah, with specified boundaries, on the 12th June 1845. Before the defendants received their pottah, disputes had arisen between the parties as to the boundary between the grants, which were amicably settled in January 1843, when the Sonakhalee khal was fixed as the line of demarcation. After the defendants had obtained their pottah from Government, fresh disputes arose, the plaintiff alleging that the defendants had crossed the eastern boundary and taken possession of lands

in his (plaintiff's) possession. A case under Act IV. of 1840 was instituted, and the land awarded to the defendants. The plaintiff then applied for a pottah, the boundaries entered in which did not include the land awarded to the defendants under the Act IV. decision; and on his claiming them, the revenue authorities declared themselves incompetent to disturb the award of the criminal courts, and recommended him to prosecute his claim in the civil court, which he has now done. His contention is, that the defendants had crossed the eastern boundary laid down in his own pottah, and taken possession of land which plaintiff had previously occupied under his amulnamah; that the eastern boundary recorded in defendants' pottah is the Sonakhalee khal and the Komooriah Joola khal, and the western boundary in the plaintiff's pottah is the Komooriah Joola khal; that to the northward the Komooriah Joola forms the boundary between the two grants; but to the southward the Sonakhalee forms the boundary of the defendants' grant, while the Komooriah Joola, which defendant wishes to make out to be the Sonakhalee, continues according to the pottah to form the western boundary of the plaintiff's lands, and the area included between those two streams is claimed by plaintiff as part of his grant, of which he acquired possession under his amulnamah; and that it is not comprised in the defendants' pottah, being to the east of the real Sonakhalee khal. We think that the lower courts should have ascertained the exact position of the Sonakhalee khal, which is the eastern boundary of the defendants' pottah; and if the land in dispute be found, as alleged by plaintiff, to be to the east of that khal, the defendants can, under their pottah, have no valid title to it. Such an inquiry would not, we think, be any improper interference with the acts of the revenue authorities, by whom the plaintiff has been referred to the civil court to establish his claim to these lands. We remand the case, to be disposed of with reference to the above remarks.

SUMMARY CASES.

THE 25TH APRIL 1859.

C. B. TREVOR, Esq., Judge, and G. LOCH, Esq., Officiating Judge.

Petition No. 807 of 1858.

Application for Summary Special Appeal from the decision of Mr. R. J. Scott, Judge of Patna, dated 25th September 1858, affirming that of Moulvee Mahomed Hanif Khan, Principal Sudder Ameen of that district, dated 5th June 1858, in the case of

Poorseedun Pandeh, (Decree-holder,) *Petitioner,*

versus

Musst. Shamsounderee, wife of Luchmun Singh, (Debtor,) *Opposite Party.*

Moonshee Ameer Alee, for Petitioner.

Moulvee Murhumut Hossein, for the Opposite Party.

IT is hereby certified that the said application is granted on the following grounds.

Poorseedun Pandeh, decree-holder, petitioner, obtained a decree against one Luchmun Singh. In execution, he moved the court that the rights and interests of Luchmun Singh, in a house with the land upon which it stood, and in a garden with the land constituting the same, then in the possession of Luchmun Singh's widow, Shamsounderee, might be sold in execution. Rughoonath Singh, a brother of the deceased Luchmun, objected, urging that the property was his, and that, after the house had been burnt, he had rebuilt it at his own expense. As to the house, the principal sudder ameen was of opinion that that had been repaired at Rughoonath Singh's expense, and that it was in his possession. Regarding the land upon which the house and garden stood, and the garden itself, the principal sudder ameen directed that a mofussil enquiry should be made for the purpose of ascertaining who had planted the garden, and in whose possession the orchard was.

On the appeal by the decree-holder, the judge dismissed his claim *in toto*, 1st, inasmuch as there was no proof that Luchmun had any right in the property; and, 2nd, inasmuch as, regarding the property of the deceased, a regular suit was then pending.

The decree-holder now appeals specially, urging that the decision of the judge is unjust, that he gave no reasons for the result at which he has arrived, and that, when the principal sudder ameen had ordered that a mofussil enquiry should be made, the judge should have allowed that to proceed, though the order of the principal sudder ameen is in itself defective as applying only to the orchard.

We think that an enquiry regarding the garden and the lands upon which the house and garden stand, as ordered by the principal sudder ameen, regarding the garden alone, should be allowed to

Case remitted, in order that the mofussil enquiry, which was first considered necessary by the principal sudder ameen, and which, as to its scope, has been somewhat extended by the order of the Court, may be made, and such order passed as may seem to the principal sudder ameen just and proper.

proceed. We therefore reverse the order of the judge, and remit the case to him, with directions that he will remand it to the principal sudder ameen. The principal sudder ameen will then, having caused the enquiry which he considered necessary, as extended by the Court, to be completed, pass, regarding the garden and the land upon which the garden and house stand, (for with the order regarding the house itself we do not interfere,) whatever order may seem to him to be just and proper. The judge also, should the matter come before him in appeal again, will, as regards the house and garden and the land upon which both stand, pass whatever decision the justice of the case may seem to him to require.

THE 27TH APRIL 1859.

H. T. RAIKES and A. SCONE, Esqs., Judges, and H. V. BAYLEY, Esq.,
Officiating Judge.

Case No. 447 of 1858.

Summary Special Appeal from the decision of Mr. W. Taylor, Judge of Mymensing, dated 29th April 1858, reversing a decree of Syud Ahmud Buksh Khan, Principal Sudder Ameen of that district, dated 2nd July 1857.

Tareeneekant Lahooree, *Petitioner,*

versus

Bhageeruttee Debea and others, *Opposite Party.*

Baboo Unookoolchunder Mookerjee, for *Petitioner.*

Baboo Kishensukha Mookerjee, for the *Opposite Party.*

Under the circumstances of the case, interest was disallowed to the decree-holder upon a sum held in deposit on his account, but not paid, pending result of an appeal of the party cast, for the period of pendency of the appeal. The decree-holder did not offer to draw the sum on security for eventual fulfilment of orders on the appeal. As the money was available, there was no risk lest it should not be paid, and no interest could, therefore, be allowed to compensate for such a risk.

THIS case was admitted to summary special appeal on the 7th September 1858, under the following certificate recorded by Messrs. C. B. Trevor and H. V. Bayley.

"It appears that petitioner, as plaintiff, obtained a decree against certain defendants.

"The principal sudder ameen in execution passed an order to the effect that, as a certain sum was in deposit in the court's treasury to the credit of defendants, the plaintiff (special appellant) might have it. He subsequently ordered that, as the decision generally, by which plaintiff obtained his decree, had gone up on the appeal of the defendants to a superior court, plaintiff could not have the money in deposit.

"The result of the appeal of defendants was, that the decree in plaintiff's favor was affirmed.

"On this plaintiff asked for interest for the period the appeal was pending.

As the money was available, there was no risk lest it should not be paid, and no interest could, therefore, be allowed to compensate for such a risk.

"The principal sudder ameen admitted this application. On appeal from the principal sudder ameen's order, the judge held that, as no one had given orders preventing plaintiff's taking the money in deposit, and plaintiff had taken no steps to obtain it, the claim for interest was inadmissible.

"The plaintiff appeals specially, urging, 1st, that he was prohibited by the principal sudder ameen from taking the money ; and, 2nd, that the defendants were the cause of the principal sudder ameen's prohibitory order, by taking the case up in appeal.

"On a reference to the record, we find that the objection on the first point is borne out by it, and we admit the special appeal to try whether the judge's order is correct on this or on the second point."

JUDGMENT.

Messrs. H.T. Raikes and H. V. Bayley.—The appellant's pleader before us only argues that, as one condition of taking up the amount would have been to provide security for its repayment in the event of the first decree being reversed, his client, the present appellant, was neither bound to take the money nor to forego the interest which accrued on the decree in consequence of his not doing so.

But it appears to us, as the rules of our courts allow a defendant to pay up the amount of a decree, with the interest due, at any time either before or after issue of execution, and also provide that, if an appeal be pending, the respondent is at liberty to take away the amount on security only, that the rules in force look to the security such deposit affords to the decree-holder, for the payment at any time of the amount decreed, as sufficient, without allowing interest thereon, as no provision is anywhere made for its payment.

In the present case the special appellant never objected to receive the amount on the ground now taken, namely, the obligation to provide security ; had he done so, the debtor might have had the option of taking away his money and making his own use of it ; but, on the contrary, the special appellant had all the advantage of his money being at any time within reach, and now wants to add thereto the addition of interest, which is generally considered to compensate for a risk which, in the present case, never existed. We see no reason to interfere, and dismiss this appeal, with costs.

Mr. A. Sconce.—The pleader for special appellant in this case is unable to show us that any order had been made by the principal sudder ameen, subsequent to the appeal of the debtors against the decision of the court of first instance ; and we have to confine our consideration of the case simply to the effect of the appeal having been preferred, in so far as that appeal can be held to operate to stay the definite execution of the decree which the special appellant had obtained in the first court. The judgment debtors lodged the money for which the decision of the first court had held them

answerable, but, at the same time, dissatisfied with that decision, they carried the case before the appellate court, and by this act they seem to me to become answerable for suspending the definite disposal of a decision which, but for their appeal, would have been at once final. By law, when the appeal was preferred, it was not competent to the first court to carry out its decision, unless the plaintiff, in whose favor the decree had been made, should give security for the fulfilment of any order which the appellate court should eventually make; and it seems to me, therefore, that the act of the defendants, appellants, should be held to fetter and restrain the decree-holder, and that they are properly answerable for interest on the debt, which the plaintiff, decree-holder, was not at liberty to take in discharge of the decree, till the appeal was disposed of.

THE 30TH APRIL 1859.

H. T. RAIKES and A. SCONCE, ESQs., Judges, and H. V. BAYLEY, ESQ.,
Officiating Judge.

Case No. 784 of 1858.

Summary Special Appeal from the decision of Mr. F. B. Kemp, Judge of Backergunge, dated 4th September 1858, reversing a decree of Pundit Sreenath Bidyabagish, Principal Sudder Ameen of that district, dated 28th December 1857.

Mrs. Sophia Foley, Decree-holder, *Petitioner,*
versus

Annie Kalonas, Debtor, *Opposite Party.*

Baboo Ramapersad Roy and Mr. R. T. Allan, for Petitioner.

Baboos Shumbhoonath Pundit, Dwarkanath Mitter, and Kishenkishore Ghose, for the Opposite Party.

Held that, as the bond debt in this case was clearly held, by a final decree of a competent court, to be a personal debt of a certain party, it could not be realised from the estate of the deceased husband of such party.

THIS case was admitted to summary special appeal on the 15th February 1859, under the following certificate recorded by Messrs. A. Sconce and D. I. Money.

"It appears that, after the death of one Marinos Kalonas, disputes arose relative to his estate between his widow and a son, Nicholas; that arbitrators were named to effect a settlement, and that by their award the estate of the deceased was apportioned as follows: one-fifth to the mother; one-fifth to Nicholas; one-fifth to another brother, Demetrius; and, making the remaining two-fifths into three shares, of these one went to Nicholas, and two to Margaret and Sophia, daughters.

"It also appears that, subsequently, Margaret, and at the time of her marriage, entered into an engagement with Annie Kalonas, wife of Nicholas, by which Annie was assumed to be the representative of her husband, then insane, and in lieu of a bond for rs. 4000,

executed by Annie Kalonas in her favor, Margaret resigned all claim upon her deceased father's estate.

"Afterwards Margaret assigned the bond for rs. 4000 to her sister and her husband, these petitioners: they sued Mrs. Annie Kalonas and got a decree for the amount. In execution of that decree they attached the estate of Nicholas Kalonas, who is still an insane. But as the zillah judge has held the engagement executed by Mrs. Annie Kalonas to be personal to her, and released the attachment, petitioners, the decree-holders, prefer a special appeal to this Court.

"Two points are submitted as grounds of appeal: *first*, that as Mrs. Annie Kalonas acted on the part and for the benefit of her deceased husband, his estate should be liable for the debt contracted: and, *second*, that the petitioners have a lien on the estate, equivalent to the unpaid consideration offered for the resignation, by Margaret Kalonas, of her interest in the estate.

"We admit the special appeal for the decision of these points."

JUDGMENT.

In this case the leading facts have been stated in the above certificate. The special appellant's pleader urges, that Mrs. Annie Kalonas acted, in the purchase of Margaret Kalonas's interest in her father Marinos Kalonas's property, and in giving Margaret Kalonas a bond for rs. 4000 for the amount, only as the agent for her insane husband Nicholas; that it was the fact of that insanity which alone made it necessary for her to act instead of her husband; that, although the bond was given as if it were from herself only, still the *ikrar* written at the time clearly showed that Annie Kalonas's acts were done, not with reference to any personal interests of her own, but merely to do the best for the interests of her insane husband, in respect to his rights relatively to those of others of his family; and that the details of the several interests of the Kalonases, in regard to their father's property, given in the *ikrar*, shows this. It is pressed upon us, too, in behalf of special appellant, that the result of rejecting special appellant's plea would be to rule that the petitioners' holding the bond for rs. 4000 by Margaret Kalonas's assignment to them, and that such bond for rs. 4000 being admitted to be in lieu of Margaret Kalonas's interest in her father's property, obtained by Nicholas in consideration of this bond of his wife, cannot be realised from Nicholas's property, though the bond was only given for Margaret's relinquishment of her interest in *that* property.

The special respondents rely on a decision of the 4th February 1857, from which no appeal was made, and in which the judge has clearly and distinctly held that the bond for rs. 4000 was a personal debt of Annie Kalonas. In that case, Mr. Paul, debtor of Marinos Kalonas, and of his heirs, Nicholas and others, had

deposited rs. 6000 on account of the decree given against him. The present petitioners then applied for the amount of this bond to be paid from that deposit; and the application was refused with the distinct ruling by the judge, that it was so refused because the bond-debt of Annie Kalonas to Margaret was personal and could only be realised from herself. The special appellant's pleader endeavors to make a distinction between that execution case and this. He says that, in that case, the refusal of their application might have been correct, and at the same time not affect the propriety of their claim in this case; because there the property, on account of which the deposit was made, was that of the father, Marinos Kalonas, to which Nicholas and others were all heirs, while in this case the bond was given by Annie Kalonas for the relinquishment, by Margaret, of her rights, not as to all the heirs, but for the benefit of the share of Nicholas only.

We are of opinion that, as the judge, on the 4th February 1857, clearly held that the bond-debt was a personal one of Annie Kalonas, and no appeal was made from that decision, it cannot be interfered with now. The words are distinct and precise, and admit of no doubt.

THE 30TH APRIL 1859.

H. T. RAIKES and J. H. PATTON, Esqs., Judges, and G. LOCH, Esq.,
Officiating Judge.

No. 630 of 1858.

*Summary Appeal from the decision of Mr. G. S. Bell, Officiating
Principal Sudder Ameen of the 24-Pergunnahs, dated 19th
July 1858.*

Prannath Chowdhree, *Petitioner,*
versus

Rajkishoree Dasse and others, Defendants, *Opposite Party.*

*Baboo Ramapersad Roy, Shumbhoonath Pundit, and Juguda-
nund Mookerjee, and Moonshree Ameer Alee, for Petitioner.*

*Baboo Unookoolchunder Mookerjee and Moulvee Murhumut
Hossein, for Defendants.*

A sued to reverse a revenue award and to recover possession of certain lands decreed thereby to the defendants. THIS case was admitted to summary appeal on the 9th December 1858, under the following certificate recorded by Mr. A. Sconce. "It appears that, in the court of the principal sudder ameen, a suit was instituted by Poora Soonderee and Surbo Soonderee, while the case was pending, the rights and interests of A. in pergunnah Bazeedpore, to which the land in dispute was alleged to belong, were sold at a sheriff's sale and purchased by the petitioner, who applied to have his name substituted in the place of A. The principal sudder ameen rejected this application and struck off the suit in default.

Held, that there was no objection to petitioner's name being entered jointly with those of the former plaintiffs, as in the decision provision could be made for the due payment of costs and profits.

zemindars of pergunnah Bazeedpore, for the recovery of 1550 beegahs, in reversal of a revenue award; that on the 23rd November 1857 the defendants' answer was filed, and a reply called for from the plaintiffs; that the plaintiffs' rights and interests in the zemindaree were sold at a sheriff's sale to the present petitioner on the 3rd December 1857; that on the 4th January 1858 petitioner applied to the principal sudder ameen to be permitted to carry on the suit in lieu of the original plaintiffs; and that the principal sudder ameen, holding that petitioner could not be substituted for the original plaintiffs, struck off the suit on default, because the plaintiffs had failed, within six weeks, to file a reply to the defendant's answer.

"Petitioner, in appeal, urges that he was competent, as the estate, to which the lands sued for were asserted by the plaintiffs to belong, devolved on him, to carry on the suit as zemindar by virtue of his purchase of the rights of the former zemindars, the plaintiffs.

"The principal sudder ameen seems to have considered the suit personal to the original plaintiffs, because they had paid the costs of institution, and because they claimed wasilat from 1262. But I rather think that, in conformity with the not uncommon practice of our courts, such a representation as the petitioner seeks to effect is admissible; and that, on coming to dispose of the case, it is perfectly possible, if necessary, to distinguish between the claim for the land and the claim for wasilat, previous to the date of the petitioner's purchase. I admit the case, however, for the determination of a full bench."

JUDGMENT.

The objections raised by the counsel for the respondents are, that the petitioner, not having paid the stamp fee and other preliminary costs, cannot be substituted for the original plaintiffs, without their consent, and that the claim being for wasilat, as well as for possession, the petitioner is not entitled to wasilat for the period previous to his purchase, and, consequently, if the petitioner were substituted for plaintiffs, the nature of the suit would be changed. On the part of the petitioner, the decision of this Court of 15th March 1849, page 70, Bhyro Indernarain, appellant, and of 4th February 1858, page 323, Bholanath Singh, appellant, are quoted to show that the Court have permitted such substitution. In the first case, however, the appellant was acting under a power of representation from the revenue officers, in pursuance of the transfer of the estate to him, in order to enable him to carry on the suit, which had been instituted on account of Government, the auction purchaser. In this the consent of the former plaintiff was obtained, and in this respect differs from the case now before us. The second case quoted is not, as far as we can learn from the

printed decision, applicable. We think, however, that the objections raised by the defendants are of no insuperable weight. It is a matter of no real importance to the defendants, whether the petitioners have or have not paid the stamp duty, and the decree eventually passed might provide for the reimbursement of the party who has paid the amount. The substitution of the petitioner for the plaintiffs, whose rights and interests in the Bazeedpoor pergunnah he has purchased, can be productive of no real injury to the defendants, and while the petitioner lays no

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Held, that no legal necessity was made out to admit of the childless Hindoo widow in this case creating a putnee talook and appropriating the premium derived from assigning, in putnee, the property, in which she had but a restricted life interest.

Held, that plaintiffs, as brother's sons, were heirs by Hindoo law in preference to a defendant, a brother's son's son ... 567

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With reference to the above case, held that, as plaintiffs' father had no rights while the widow was alive, and the sale in execution of a decree of his rights took place in her life-time, the sale did not affect plaintiffs' right, which accrued only after the widow's death, and so plaintiffs' right could not, as contended, have been extinguished by such sale ... 570

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- Case remanded; an issue raised on trial not having been disposed of* ... 585
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- Joogulkishore Surma and others v. Rajbullub Surma and others.**
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- Doorgapersad Roy Chowdhree v. Tarapersad Roy Chowdhree.**
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in the first, and, notwithstanding the Privy Council's order on the appeal, B. was unable to obtain review of the second decree, and after a time filed a suit for its reversal, the Court concurred with the lower court, that no new ground of action had been raised, and the suit was barred by Section XVI. Regulation III. of 1793; but intimated that the second decree having never been specially appealed, it was open to B to request a review thereof by the zillah court ... 596

Koowur Dowlut Singh v. Ramsurun Singh.

Case remanded to the principal sudder ameen, in order that he may examine the whole evidence on the record, both documentary and oral, as to the right and possession of the parties before him, and pass whatever decision may to him seem just and proper ... 600

Rajah Nundlall Roy v. Rajun Berah, Gobindpersad Chuckerbuttee and another.

Case remanded, the lower court having misunderstood the effect of a previous order of remand ... 601

Rajah Nundlall Roy v. Narain Pattur, Gobindpersad Chuckerbuttee and another.

See preceding case ... 602

Chunderkanth Mookerjee and another v. Issurchunder Mozoomdar.

Chunderkanth Mookerjee and another v. Lukheemonee.

Case remanded, having been transferred from one moonsiff's file to another unawares to petitioner ... 603

Ramnarin Burral and others vs. Kenaram Burral and others, and Degumber Burral.

Where the question of limitation is involved in the main issue of the validity of the plaintiff's title, and the merits of the case have been fully investigated in the lower court, it is unnecessary for the appellate court, in reversing the order of dismissal on the ground of limitation passed by the lower court, to remand the case for a decision on the merits ... 604

Pudabuttee Dassea and others vs. Huromonee Dassea and others.

A plaintiff claiming under a will, and not by virtue of inheritance, cannot be permitted to shift her ground, and ask a decree on the ground of right by inheritance ... 605

Nubokishen Mookerjee v. Kaleepersad Roy and others.

Held by the majority, that the burden of the plaint in the present case is not that Joykisto and Rajkisto Mookerjee, on granting the putnee lease to the defendant Kaleepersad Roy, acted beyond the power given to them by the will of their father, but that they acted in contravention of their duty as guardians, to the detriment of the plaintiff, and therefore the act so done fraudulently and collusively is liable to cancelment; that, consequently, the objection taken by defendant, respondent, that, as the plaintiff, neither with the plaint, nor subsequently, has produced the will, nor given good reasons for its non-production, nor proved the registered copy filed by him, his suit should be dismissed, falls to the ground. Moreover, as the party who first in the pleadings raised the question of power under the will of plaintiff's father, was the defendant Kaleepersad Roy himself, it was incumbent upon him, if upon any one, to have the original will produced.

Held, also, by the majority, that, even in a case founded on a will in which the evident contention is as to the terms of an admitted, and not the

authenticity or genuineness of a propounded will, the application of the strict rules as to the admission of secondary evidence would be misplaced ; and as both parties admit the will executed on a particular day, a registered copy of the same, if the original were in the possession of a third party, and not produced, would be quite sufficient, under the circumstances, for the purposes of the suit.

Held by the majority, that the fact of letting out the property of the minor ward in putnee is of itself an act at first sight so injurious to the party possessing the right of ownership, as, on a suit being instituted by that owner, after reaching his majority, calling that act in question, to throw the burden of supporting it at once on the guardians, or putneedar, or both.

Held by the majority that, though the defendant has failed to show that the grant of the putnee lease to him was warranted by the terms of Jugomohun's admitted will, still he has sufficiently shown that the transaction between him and the executors was not injurious to the plaintiff, or of a character to raise a suspicion of fraud and collusion.

Held by the whole Court, that the evidence of the confirmation by the plaintiff, after he had attained his majority, of the act of the executors, with reference to the putnee lease granted to defendant, is clear and conclusive.

Appeal dismissed, and the order of the lower court affirmed, with costs ... 607

Ajeeba Beebee and others v. Juggesur Bhattacharj.

Held, that as the son signed the kistbundes in the present case, as the agent of a disclosed principal, his mother, it was competent to the plaintiff to sue the principal alone, but not the principal and agent together.

So much of the judge's decision as makes the son liable on the kistbandee, reversed, and special appeal decreed, with costs ... 619

Gogunchunder Sein and others v. Joydoorga alias Golukbasse and others.

Held, that none but the immediate reversioner is entitled to sue to interfere with the acts of a Hindoo widow in possession.

Held also, that a petition presented by the immediate reversioner, when the suit was pending in special appeal, waiving his rights in favor of the plaintiffs, in order to cure the defect of parties, could not be admitted at that stage ... 620

Shumbhoochunder Ghose v. Moheschunder Mitter.

Held, that the present action, which is one simply for the attachment of surplus proceeds, to which the plaintiff considers he has an inchoate right, and which he alleges he is apprehensive the mortgagor may appropriate ere he is able to bring his action, for possession of the property mortgaged to him, and for the money in deposit as representing that portion of the property sold for an arrear of rent, is altogether inadmissible in our courts.

Held that, as the mortgagee's second suit for possession of the mortgaged property, and the surplus proceeds as representing land, is pending, he can, if he thinks fit, and if he has reasonable apprehension that the mortgagor intends to remove the surplus proceeds, move the court under Section V. Regulation II. of 1806, for the attachment of the same.

The special appeal decreed, with costs ... 622

Deenonath Roy, after him his wife Beendoobaseenee Dassee, mother and guardian of Hurreemohun Roy and another, minors, v. Gopal Mundul.

The special appeal was admitted, to determine whether the defendant was not bound by an admission made by him, in another case, as regards his jumma ; but as the special appellant was unable to show that the respondent had made a distinct admission that his jumma was rs. 110, and the judge had found that the kutoolgut on which the suit was brought, and the

- accounts filed in support of it, were spurious, and that the pottah held by the defendant was valid, the appeal was dismissed ... 624
- Dohee Beebee v. Lallchund and others.
- A remand postponed for appearance of adverse party* ... 627
- Chulloo Koowur v. Doyalnarain and others.
- Case remanded. Though there was no defence, the lower court should get have sifted the proofs for the prosecution* ... 628
- Bejoy Gobind Bural and another v. Messrs. R. Watson and Co.
- Plaintiffs sued for the removal of a ferry recently established by defendants in the vicinity of their ferries, on the ground that their ferries were public within the meaning of Clause 1, Section VI. Regulation VI. of 1819, and that the establishment of the new ferry had injured the collections at their ghats.*
- Held, that, though the collections from the plaintiffs' ferries were included in the assets of the zemindaree when it was permanently settled, those ferries did not, in consequence, come within the meaning of Regulation VI. of 1819, and that no action for damages could be brought, on the ground that the establishment of the new ferry was detrimental to the collections hitherto realised at the old* ... 629
- Sreenath Chatterjee and others v. Ramdeen Bhuttacharj and others, and Bud-dunchunder Bhuttacharj and others.
- In a suit to set aside alienations by a Hindoo widow, limitation runs from her death, previous to which the husband's heirs have merely a contingent interest in the property* ... 631
- Wooma Misserain and another v. Byjnath Misser and others.
- Held that, in a suit in which the main prayer of the plaintiffs is for possession by right of inheritance, it is not competent to the Court, on that claim failing, to enter into a consideration of points which were only auxiliary to the main one, and which were raised by plaintiffs only in order to remove obstacles to their immediate possession.*
- So much of the decision of the lower court, as declares the deeds of gift and adoption invalid, reversed, and the special appeal dismissed, with costs* ... 632
- Anundchunder Mytee v. Imamooddeen Sheikh and Bholanath Koond Chowdhree and others.
- Anundchunder Mytee v. Guzzaboodeen and Bholanath Koond Chowdhree and others.
- Anundchunder Mytee v. Kamoo Sirdar and Bholanath Koond Chowdhree and others.
- Anundchunder Mytee v. Torab Mundul and Bholanath Koond Chowdhree and others.
- Anundchunder Mytee v. Kumuroodeen Sirdar and Bholanath Koond Chowdhree and others.
- Bholanath Koond Chowdhree and others v. Madhubchunder Majee and Syud Owlaud Aleo for self and as heir of Nuzzeer Aleo.
- Held that a civil suit to set aside a summary decree is not simply an appeal, it is an appeal, and something more; in other words, although the issue to be tried by the civil authorities is identical with that tried before the revenue courts, the parties are not confined to the same evidence, but can add to that which was filed in the summary proceeding.*
- Held, also, that civil suits can be brought to reverse summary decrees either in consequence of their illegality, or of their non-conformity with justice.*

- In the former class of cases, the legality of the summary decree is the sole point in issue. In the latter, the sole issue is on the merits, and the civil courts have only to look to the matter in issue as it is before them, and not as it was before the revenue court.*
Case remitted to the judge for re-investigation with reference to the Court's remarks ... 636
- Musst. Sabirra Beebee v. Musst. Dewan Beebee and others.
 Jehan Buksh and Kureem Buksh v. Azuloodeen Mahomed and others.
 Musst. Sabirra Beebee v. Azuloodeen Mahomed and others.
- The collector having purchased an estate, and engaged with a shikmeedar within it, reserving right of sale of the shikmee, the tenure was a salable one within the meaning of Section VIII. Regulation VIII. of 1819; but the zemindar only, and not a farmer, had power to sell the tenure. Order of the moonsiff upheld against the decision of the judge* ... 638
- Dabeechurn v. Bheem Roy and others.
There not having been any miscarriage in the lower court's proceedings, order confirmed ... 640
- Bydnath Dass v. Gooeroopersad Roy Chowdhree.
Special appeal rejected, the plea in it not having been urged by petitioner when he appealed from the decision of the court of first instance to the lower appellate court, from the judgment of which he now appeals specially ... 641
- Radhakishen Chuckerbuttee and others v. Goluckhunder Shaha and others, the Collector of Tipperah and others.
Judgment in accordance with that dated 30th April 1859, Collector of Tipperah versus Goluckhunder Shaha ... 643
- Hurgobind Chowdhree and others v. Sheikh Sonaoollah and others.
Remanded in accordance with precedent cited ... 644
- Toolsee Mahtoon v. Jumun and others.
The plea in special appeal being that a lower appellate court, not having gone into the validity of a bond, in regard to three of four parties to its judgment, was defective; held that, as the judge had on appeal decreed the deed invalid altogether as an interpolated document, this plea was inadmissible ... 645
- Owdan Singh and others v. Mohunt Burmo Geer, heir and disciple of Mohunt Luchmun Geer, deceased.
The deed of settlement was not specific on the point, whether the land in defendant's possession was part of the land settled for with petitioners. As the lower court had decided the point as a matter of fact, the Court could not interfere. Appeal dismissed ... 647
- Saadut Alee and others v. Mussumat Kuroonamoyee.
Case remanded, for re-trial on the proper issue raised by the case, not whether a jumma-wasil-bakee had accompanied the demand of rent, but whether plaintiff had discharged his rent or not under a legal assignment 649
- Mr. C. Swain v. Sheikh Reazut Alee and Koorshed Alahee and others.
Appeal dismissed; for plaintiff's payment of revenue in excess of his own share for defendant's benefit, it was in evidence, could not include the kist for the month for which defendant claimed a set-off ... 650

Bakir Aleo v Mahomed Rowahun.

Case remanded, for re-trial upon the merits. The lower court could not, on appeal, decide upon a special point ruled by a special law, which the court of first instance had not taken up ... 652

Bucha Chowdhree v. Purmesuree Dutt Jha.

Case remanded, because, as the provisions of Act XIX. of 1853 concerning default could not apply, petitioner was entitled to a hearing ... 653

Collector of Hooghly and others v. Rajkishen Singh.

Remanded under precedent cited ... 654

Nobinchunder Adhikaree v. Ranee Bhugobuttee Debea and others.

Appeal dismissed. Plaintiff could not produce reliable evidence that the lands claimed belonged to his purchased estate ... 654

Buddecoodeen Ahmed v. Mahomed Vasil and others.

Remanded under precedent ... 656

Gopalchunder Surma Roy v. Tarasoonderree Debea, heir of Gungamonee Debea, deceased.

Held, that as the debt out of which the present suit has arisen was a personal one of Kunukmonee, those persons who succeeded to her property, and those only are liable for her debts, and that to the extent of the property acquired from the deceased. In order, therefore, to determine whether the defendant, Tarasoonderree Debea, the step-daughter of Kunukmonee, is liable or not, it is necessary to ascertain whether she succeeded by will, or otherwise, to any property, for, by inheritance, she could not, under Hindoo law, succeed her step-mother.

As this point has not been completely and clearly ascertained, the case is remanded, in order that certain enquiries may be made and a decision passed in conformity with the facts as they may eventually be found to be ... 657

Pertabchunder Banerjee v. Nundocoomar Banerjee and others.

In a case where both parties admitted there was no divided possession of a cutcherree in suits, held, that an issue to try that point was unnecessary.

Where also plaintiff's claim fell short of what defendants admitted to be the value of the items in suit, held, an order for remand for trial of these points was not requisite.

Held, further, that the lower court should not have recorded what would be the result of plaintiff's failing to prove a particular issue, until the final decision of the suit ... 660

Frankishen Dhur and Soodhakishen Dhur v. Kishenchunder Chuckerbuttee and others.

Held, that when a lease is granted benamie to a person and a separate deed of assignment to him of a great portion of the rent payable to the zemindar is executed at the same time, the transaction, though contained on two different documents, must be considered as one transaction; and that, in any suit brought by the zemindar or his representatives against the lessee, the whole transaction must be pleaded, and if, from any cause, that may not be done, the lessee has no separate action for remedying the effect of his own negligence, but must suffer the penalty of his own laches.

Case dismissed, and decision of lower court affirmed ... 661

Nursingh Koontya v. Rama Bye and Blugeeruthee Dassee and others.

On review of judgment, former decision maintained, in the absence of proof that the mortgage deed to appellant was executed in satisfaction of another person's debts ... 667

Moulvee Salamut Aleo v. Gopeekishen Bose and others.

Shunkursun Bose and others v. Moulvee Salamut Aleo and others.

Suit remanded, that the issue regarding the share of the judgment debtor in an estate purchased by plaintiff may be determined. A finding on the above issue being necessary to determine whether a putnee of the said estate, granted by the said judgment debtor and other defendants to another set of defendants, collusive, or otherwise ... 668

Gunganarain Pal v. Kishenmohun Pal.

Plaintiff sued for a share of ancestral property on a right by inheritance; and defendant pleaded that the whole property devolved on him by right of primogeniture, according to family custom.

Hold that, as plaintiff pleaded long possession, under his right of inheritance, and dispossession, he should first prove these pleas; but as plaintiff in no way proved these points, plaintiff's (appellant's) appeal was dismissed ... 671

Pertapchunder Burrowa v. Koroanamoyee Debea and others.

Authority having been given by the Sudder Court to a particular zillah court to try a cause respecting landed property, alleged by one party to be in one district, and by the other in another, no question of jurisdiction can arise, and lower court ought not to dismiss suit on the ground that the property appears, by thakbust map, to be in another district ... 674

Meheroollah alias Meheroodeen v. Guffur Bebee and others.

Case remanded for determination of the points raised on the certificate. Plaintiff sued for possession of certain property, stating that the defendants were his trustees. Defendants pleaded that plaintiff had given up the property.

The judge, on appeal, moved the decision of the lower court, holding the suit to be barred by the statute of limitations. The judge should have ascertained whether plaintiff's allegation were true or not for, if defendant held as trustees for plaintiff, his suit is not barred ... 675

Mr. G. Lamb v. Lushkur Mahomed and others.

As one of the defendants confessed judgment as to her share of the debt sued for, the lower appellate court should not have released her from the decree. Moonsiff's order upheld ... 676

Radhika Chowdhrair v. Bholanath Ghose and others.

Kalepersad Ghose and others v. Radhika Chowdhrair.

In a suit for enhancement of rent, held, in accordance with previous decision, that Section LI. Regulation VIII. of 1793, refers to the talookdars mentioned in Section XLVIII., whose engagements with the zemindars were recorded at the time of the perpetual settlement; and that the onus of proving exemption from enhancement of rent is on the party claiming exemption. Plaintiff entitled to enhance rates, with interest, from date of notice, defendants not having contested plaintiff's rates, and having raised objections to the general right to enhance, which they had failed to establish ... 677

Soodhakanth Kubiraj Mohunt Tagore v. Russomunjooree Thakoorain and others.

Plaintiffs, as nearest male heirs of Jugudanund Tagore, sued to obtain possession of his property within twelve years from the death of his widow Dasoomonee, who survived him for more than fifty years, urging that, according to family custom, ancestral property, on the death of a widow, reverted to the heirs of the male line, to the exclusion of the female line.

Defendant, being a great-grandson of Jugudanund's daughter, pleaded limitation, and claimed the property under a special gift made by Jugudanund to his (defendant's) grandfather, Sreekanth, who was nominated by Jugudanund to be mohunt, and, on being installed, got possession of the property as appertaining to his office under a hibnamah from Dasoomonee, the widow of Jugudanund, which she executed in conformity with the instructions of her deceased husband.

Held that, unless the defendant could prove his gift from Jugudanund and his allegation that Dasoomonee was not in possession of the property as a Hindoo widow, but merely as a trustee for Sreekanth, the plaintiff's suit, within twelve years from the death of Dasoomonee, was in time, they being heirs of Jugudanund, and as such having only a contingent right during the life-time of the widow, and being incompetent to sue for possession till after her death.

Held that, notwithstanding the presumption arising from long possession, as the defendant is unable to prove his allegation of gift and his possession derived from Dasoomonee is not incompatible with her possession as a Hindoo widow, the property must, on her death, pass to the plaintiffs, the nearest male heirs

... 681

Kenaram Samunt and another v. Nilmonee Acharj.

In a suit for value of wood misappropriated, in which plaintiffs had alleged an admission by the defendant of their right to the wood in a former case, and the judge dismissed the suit, on the ground that the case referred to had been remanded for re-investigation. Order reversed, and case remanded, on ground that plaintiffs' suit was based on their general right to the wood, which ought to be investigated, and that the alleged admission was merely evidence of their claim

... 687

Madhubchunder Aduk v. Nagenderchunder Ghose, receiver on behalf of Anundnarin Ghose and Thakoordass Holdar and others.

The judge having assumed a title by a grant, further proof beyond such assumption was deemed requisite, and the case remanded accordingly

... 688

Rughoonath Chuckerbuttee v. Kasheshuree Debea.

In accordance with precedent, proceedings of enquiry about a supposed forgery stayed, pending disposal of an appeal preferred by the accused, against the decree passed

... 691

Goyadeen Patuck

... 692

Bholanath Singh v. Kishengobind Biswas.

A putneedar cannot hold a durputnee liable for an old balance. When it was sold to a new durputneedar for balance of rent, a previous balance due upon a decree became a personal debt of the ousted durputneedar. Order of lower court reversed

... id.

Shumbhoonath v. Koodrutoollah and another.

Summons three times at intervals of a week required, as ruled by Sudder Dewanny Adawlat Decisions, 24th April 1851, page 217

... 695

Mahatab Singh v. Zalim Singh, and, on his demise, Mussumat Chando, widow of the deceased, and Nanukpersad Singh.

Lower court's order was correct, making the brother and widow, who were in joint possession of deceased's property, liable for the decree against him ... 695

Gendun Bebee v. Lalla Bechoo Lall.

On a special appeal to the effect that an order relating to costs was equally applicable to mere profits, held that it was so in this case, as in it two decree-holders hold decrees against each other, and those decrees, with all such items as they comprised, should be debited and credited in adjustment of the respective accounts ... 697

Syndaul Hossein v. Government and Gunganarain Mehtee.

The liability of a treasurer's surety under security bond continues, even though he has been discharged on formal acquittance, until the accounts of the period during which he was surety have been correctly balanced.
Lower court's order correct, excepting as to the interest charged upon the surety ... 698

THE 3RD MAY 1859.

H. T. RAIKES and A. SCONCE, ESQS., Judges, and H. V. BAYLEY, ESQ.,
Officiating Judge.

Case No. 739 of 1857.

*Regular Appeal from the decision of Baboo Ramlochan Ghose,
Principal Sudder Ameen of Nuddea, dated 9th June 1857.*Mr. R. Larmour, Manager of the Bengal Indigo Company, (Defendant),
Appellant,
versus

Musst. Tripoorasoodere Dasee and others, (Plaintiffs,) Respondents.

*Baboos Ramapersad Roy and Jugudanund Mookerjee and Mr.
R. T. Allan, for Appellant.**Baboos Kishenkishore Ghose and Baneemadhub Banerjee, for
Respondents.*THE suit is for possession of land and for reversal of putnee
leases, and is laid at rs. 16,853-7-12-1.The grounds of the action are, that the plaintiffs are entitled to
the talooks in question by right of inheritance, and that the widow,
Onnopoorua, who created the putnees, had no power to do so, as,
being a childless widow, with a life interest, she could only create
rights co-existent with her own life, except under such a necessity as
the Hindoo law admits, and which was not shown in this case.It appears that one Chundermonee Moostafee was the common
ancestor. He had four sons, (1) Seromonee, (2) Chintamonee, (3)
Surbonarain, (4) Seebnarain. Seromonee had a son, Ishwurchunder.
Ishwur had two sons, Keertichunder, who died without issue during
his father's life, and Greeshchunder, who died after his father's death,
and left a son, Moheshchunder, defendant. Chintamonee, the second
son, died, having had no son, but leaving a son adopted, viz. Juggut-
chunder; a widow, Onnopoorua; and a daughter, Greeshmonee.
Juggutchunder and Greeshmonee died without issue, the former in
his adoptive father's life-time, leaving Onnopoorua, the widow,
surviving. She died on the 6th Jeyt 1262. Surbonarain, the third
son, had two sons, Shamulpran and Kumulpran. Kumulpran died
childless. Shamulpran died, leaving a widow, Tripoorasoodere, the
plaintiff, and two minor sons, Opendro and Debendro, as whose
guardian she sues. Sheebnarain, the fourth son, had four sons,
Tincoorie, Huropran, Tarapran, and Hurrispran, all of whom died
without issue. Thus, at Onnopoorua's death, the surviving male
descendants of the common ancestor, Chundermonee, were the two
grandsons, Opendro and Debendro, plaintiffs, and the great-grand-
son, Moheshchunder, defendant.The plaintiffs claim by right of inheritance for 3 annas of talooks
Gopalnuggur and Dhee Dhobrah, which Juggutchunder held asHeld, that a
certain *neem*
puttro, alleged
to exclude cer-
tain parties from
inheritance, was
not proved.Held, that no
legal necessity
was made out
to admit of the
childless Hindoo
widow in this
case creating a
putnee talook
and appropriat-
ing the premi-
um derived from
assigning, in
putnee, the pro-
perty, in which
she had but a
restricted life
interest.Held, that
plaintiffs, as
brother's sons,
were heirs by
Hindoo law in
preference to a
defendant, a
brother's son's
son.

adopted son of Chintamonee, and Onnopoorua succeeded to, for her life, with the restricted life interest of a childless Hindoo widow ; and for the setting aside of putnee and other permanent ryotee settlements made by Onnopoorua beyond her power and without legal necessity.

The plaintiffs allege that Onnopoorua made over the putnee of 3 annas of Gopalnuggur to D. Andrews, who transferred it to Larmour, the appellant, and the putnee of 3 annas of Dhee Dhobrah to Kashinath Bose. The subsequent transfer of this latter putnee will be stated in the case No. 742, which relates to it.

In this case D. Andrews and Larmour, and Moheshchunder, the son of Ishwur, the great-grandson of the common ancestor, plead to the plaintiffs' suit, that Chintamonee gave to Onnopoorua a neem puttro, or authorisation, dated 20th Cheyt 1219, to the effect that, in the first instance, his adopted son, Juggutchunder, was to succeed, and, failing him, Onnopoorua for her life, and, after her death, the son of Ishwur, or Sheebnarain, to the exclusion of the grandsons, the sons of Surbonarain, the minor plaintiffs ; the reason of exclusion being the alleged misconduct and enmity of Surbonarain to Chintamonee. These defendants also rely on their averment, that Onnopoorua was authorised to make the putnees, as she was in recessitous circumstances, for the charges of the religious ceremonies of the family and of those for her deceased husband's soul.

The principal sudder ameen considered the neem puttro to be quite unproved, and that Onnopoorua had no right to make the putnee transfers which she did, as she could not create interests beyond the period of her own life, and these putnee rights were of as permanent a character as the zemindaree rights. He decreed the suit of plaintiffs as heirs, and ordered mesne profits to be realised from the parties who might be in possession of the portions of property transferred.

JUDGMENT.

The points brought up in this appeal for our decision are : 1, the validity of the neem puttro ; 2, the necessity for Onnopoorua to make the transfers she did, and, consequently, her legal power to make them, and whether the case should not be remanded to the principal sudder ameen, because he has not given a clear opinion as to that necessity ; 3, the plaintiffs' rights of inheritance as heirs at law.

On the *first* point we have not the slightest hesitation in stating our entire disbelief of the alleged neem puttro. It is shown by Nobocoomar that, although the deed was written in Cheyt 1219, and so deeply involved the interests of the sons of Ishwur and Sheebnarain, none of the branches of the family held the document, but the mohurrir did ; or taking it even as he says, that a confidential

servant took it to his house in 1222, and kept it till 1262, it never having been produced in any court or by any person (as far as we have been shown) in the interval. This mohurrir and other witnesses are residents on appellant's property. The evidence given by them is vague and contradictory. For instance, Shreedhur Palit says that Chintamonee himself dictated the deed; but the above Nobocoomar deposes that it was written from a fair draft. Some stress is laid by appellant's pleader on a petition of Onnopoorina, dated 28th Bysakh 1249, in which she states, in answer to a claim by plaintiffs' father, Shamulpran, in a petition by him of 25th Phalgun 1248, that Chintamonee had left her the property for her life, failing Juggut-chunder, and then to the sons of Ishwur and Sheebnarain, and to the exclusion of Surbonarain and his heirs; and that all the costs of the family religious ceremonies, and of those for her deceased husband's soul, devolved on her. No other proof is shown to us of the validity of the neeqm puttro, and we therefore entirely reject it.

On the *second* point, we have to observe, that the question of Onnopoorina's power to make *this* putnee rests on the legal necessity, which, by Hindoo law, alone enlarges the restrictions which bind a childless Hindoo widow, dealing with property in which, as such widow, she has only the life interest. No such necessity has been shown to us. The appellant's pleader has merely referred to the testimony of four witnesses as on the record, but has not read it. He has argued that a putnee lease forms one of the most common and convenient modes of managing a zemindaree; that it involved benefit to the property, as it secured a premium of rs. 4300, and no risk in management; that the witnesses to the putnee lease depose that it was made to provide for the cost of the religious ceremonies of the family and of those for the soul of the deceased Chintamonee; *lastly*, that the consent of the heirs and co-sharers, Hurish and Ishwur, was given, they attesting the lease; and that all these circumstances rendered the putnee valid.

In all the above no such necessity has, in our opinion, been here shown as to justify Onnopoorina, a childless Hindoo widow, making the putnee referred to in this appeal, and appropriating the premium derived from assigning the property, in which she had but a restricted life interest, as a putnee talook.

On the *third* point, we find that plaintiffs, as brothers, sons of Chintamonee, are, by Hindoo law, the heirs in preference to the defendant Mohesh.

Nothing has been urged on us against the principal sudder ameen's ruling on this point, and we see therefore no necessity to make any further remarks on it.

Under all these circumstances, we dismiss the appeal, with costs.

THE 3RD MAY 1859.

H. T. RAIKES and A. SCONCE, ESQS., Judges, and H. V. BAYLEY, ESQ.,
Officiating Judge.

No. 742 of 1857.

*Regular Appeal from the decision of Roy Ramlochan Ghose,
Principal Sudder Ameen of Nuddoa, dated 9th June 1857.*

Gopeemohun Banerjee and others, (some of the Defendants),
Appellants,
versus

Musst. Tripoorasoodere Dasse and others, (Plaintiffs,) and others,
(Defendants,) *Respondents.*

Baboo Obhoychurn Bose, for Appellants.

*Baboos Kishenkishore Ghose and Baneemadhub Banerjee, for
Respondents.*

Suit valued at Rupees 9500.

With refer-
ence to the above
case, held that,
as plaintiffs'
father had no
rights while the
widow was alive,
and the sale in
execution of a
decree of his
rights took place
in her life-time,
the sale did not
affect plaintiffs'
right, which ac-
crued only after
the widow's
death, and so
plaintiffs' right
could not, as
contended, have
been extinguish-
ed by such sale.

IN this case pleader for appellants raises two points. *First*, that all the rights and interests of plaintiffs' father and of Onnopoorina, in 3 annas of Dhee Dhobrah, were extinguished by his client's having purchased and executed a decree against that property. *Second*, that Onnopoorina acted under sufficient necessity to justify her making the putnee. It appears that Onnopoorina first gave a putnee of these 3 annas in Dhee Dhobrah to Kashinath Bose. It then passed to Anundchunder Dutt and Ishenchunder Ghose. The latter gave a durputnee of $1\frac{1}{2}$ annas to Ishenchunder Moostafee and Anundchunder Dutt. Anundchunder sold his $1\frac{1}{2}$ annas to Ishenchunder. Thus the latter became putneedar of $1\frac{1}{2}$ annas and durputneedar of the other $1\frac{1}{2}$ annas. Next one Seetanath took a lease from Ishenchunder Moostafee : and it was at this stage that all the rights and interests of the latter in the putnee were sold at a sheriff's sale, in execution of a bond-debt judgment by the father, uncle of defendant, Rajender Neugee, and bought by them. The purchaser, on finding the zemindaree was likely to be sold for arrears of Government revenue, advanced what was necessary to save it from sale, and then sued Onnopoorina and plaintiffs' father, and other heirs, for the recovery of the money. He got a decree, which he sold to Rajah Kumulkishen. This decree was executed, and in execution the rights and interests of plaintiffs' father and of Onnopoorina as judgment debtor were advertised in the sale notification and sold. Thus it was argued all plaintiffs' rights in this property were extinguished, and that they cannot recover any thing by this suit.

We find that the principal sudder ameen has held on this plea that, as plaintiffs' father had no rights while Onnopoorina was alive, and this sale of his rights took place in her life-time, the sale did not affect plaintiffs' present rights, which accrued only after Onnopoorina's

death. We think this view correct, and that, after Onnopoorina's death, plaintiffs, as brother's sons to Chintamonee, acquired rights quite unaffected by the sale antecedent to Onnopoorina's death.

On the *second* point, the reality of necessity under which Onnopoorina made this putnee has not been shown to us. The appellants' pleader has read the evidence of four witnesses, but it is vague and unsatisfactory; and, standing as it does alone, it is quite insufficient to establish this plea. Under such circumstances, we must deal with this case as an assignment, by way of putnee, of the probable assets of the estate, made in *perpetuity* by a widow vested only with a life interest; and as the creation of this permanent assignment is to the prejudice of the legal heirs, the incompetent act of the widow must be set aside.

We therefore dismiss the appeal, with costs.

THE 3RD MAY 1859.

J. H. PATTON, ESQ., Judge, and E. A. SAMUELLS, ESQ., Officiating Judge.

Petition No. 153 of 1859.

Application for Special Appeal from the decision of Mr. W. Wright, Principal Sudder Ameen of Bhargulpore, dated 27th November 1858, reversing that of Moulvee Abdool Munsoor, Moonsiff of Teghra, dated 29th November 1856, in the case of

Baboo Mohadeo Dyal Singh, Plaintiff, Petitioner,
versus

Tota Singh and others, Defendants.

Baboos Kaleeprosunno Dutt and Jugudanund Mookerjee, for
Petitioner.

Baboo Dwarkanath Mitter, for the Opposite Party.

IT is hereby certified that the said application is granted on the following grounds.

The plaintiff is ticcadar of a 2a.-2p.-2g. share in a certain mehal, and sued the defendants, who are ryots, for the rent of 1252, on the allegation of previous payments at similar rates. The defendant pleaded a pottah for a certain portion of the land at a lower rate than that claimed by plaintiff, and alleged that he had paid the rent for the portion uncovered by the pottah, in proof of which he produced a receipt from the plaintiff's father. The moonsiff found for the plaintiff on all points, and gave him a decree for the full amount claimed. The principal sudder ameen nonsuits the plaintiff, on the ground that it had been proved, by plaintiff's evidence, that the defendants held under a pottah; and that the moonsiff ought not,

Proof of part payments at similar rates is a sufficient foundation for a suit for rent; and the lower court held to be wrong in dismissing the suit of a lessee, because he did not produce the counterpart of a pottah which plaintiff had at some former time received from the malik.

therefore, to have allowed the plaintiff's case to proceed without production of the kuboolyut, which is the counterpart of the pottah, and which he assumed must be in the plaintiff's possession.

We observe that it does not follow, because the defendants obtained a pottah from the malik at some former period, which appears to be the case here, that the plaintiff, who is merely a lessee of a small portion of the estate, should be in possession of the kuboolyut, or able to produce it. Proof of past payments was a sufficient foundation for the suit; and the principal sudder ameen was not justified in nonsuiting a case which had been decided on its merits on such grounds as those we have quoted from his decision. His order must be reversed. The suit will be remanded, in order that the principal sudder ameen may investigate it with reference to the above remarks, and decide it on its merits.

THE 3RD MAY 1859.

C. B. TREVOR, Esq., Judge, and G. LOCH, Esq., Officiating Judge.

Petition No. 89 of 1859.

Application for Special Appeal from the decision of Mr. G. L. Martin, Judge of Tirhoot, dated 10th December 1858, affirming that of Mr. E. F. Latour, Officiating Collector of that district, dated 17th July 1855, in the case of

Sunkur Dutt, Plaintiff,

versus

Khuddo Bhukhut and others, Defendants, Petitioners.

Moonshee Ameer Alee, for Petitioners.

Moulvee Syud Murhumut Hossein, for the Opposite Party.

IT is hereby certified that the said application is granted on the following grounds.

The plaintiff, Sunkur Dutt, sued to resume certain lakhiraj lands in the (defendants') petitioners' possession. Defendants pleaded the law of limitation; and the judge, considering the suit barred under that law, reversed the collector's order for resumption. A special appeal was filed, and the case was remanded, by order of this Court, on the 17th April 1857, with instructions to decide as to the existence of the lakhiraj tenure previous to 1st December 1790. The judge has now ruled that there is no evidence to show that the tenure was in existence previous to 1st December 1790, and that the plea of limitation is inapplicable, and that, as the sunnud has been declared invalid, the plaintiff's claim to assess the land is good.

The petitioners object to the finding of the judge, that he has altogether misunderstood the dates in the sunnud; that if, as the judge finds, the sunnud was granted in 1190 F. S., the tenure must have been in existence in 1783, seven years prior to 1st December

Remanded, in order that the judge may take into consideration certain dates as explained to the Court, and the proofs of defendants' possession of the land as lakhiraj previous to 1st December 1790.

1790 ; that in the sunnud no mention of the year 1797 is made, and the year 1193 cut on the seal is the Hijree, and not the Fuslee year ; that the present is a suit to assess under Section XXX. Regulation II. of 1819, and not a claim to take possession under Section X. Regulation XIX. 1793 ; and therefore the law of limitation is applicable, if the petitioner was in possession previous to 1st December 1790 ; but the judge has made no enquiries as to the fact of possession.

We think this case must be remanded, for the judge appears to have first inquired into the validity of the sunnud, and, having held it to be invalid, has declared the lands liable to resumption. The case was remanded to determine whether the tenure was in existence previous to 1st December 1790. The judge has not inquired into the fact of the defendants' possession before that date ; and there appears to be some confusion in the judge's decision as regards the eras mentioned in the sunnud, which we have not the means of correcting, but which, if corrected, as represented by the counsel for the petitioners, might materially alter the view taken by the judge as regards the sunnud, and eventually the liability of the tenure to resumption. The judge says : " Thus the sunnud itself declares that it was not granted till 1797, corresponding with 1190. Moreover, the seal, of the grantor bears date 1193, or three years subsequent to the date of the grant." In the sunnud we nowhere find the year 1797. It is dated, 16th Ramzan 24th Juloos 1190 Fuslee, which corresponds with 1197 Hijree, and if the era on the seal 1193 be, as alleged by petitioners, the Hijree era, it corresponds with 1186 Fuslee, and the apparent discrepancies in the sunnud are thus reconciled. We remand the case for the judge to consider what is above stated regarding the dates, and, after having corrected those dates, and considered the sunnud in its amended state, with other evidence adduced to prove the defendants' plea of possession of the land as lakhiraj anterior to 1st December 1790, to pass such order as he may think just and proper.

THE 4TH MAY 1859.

C. B. TREVOR, Esq., Judge, and E. A. SAMUELLS and G. LOCH, Esqs.,
Officiating Judges.

No. 328 of 1858.

*Special Appeal from the decision of Baboo Kassissur Mitter,
Principal Sudder Ameen of Hooghly, dated 24th April
1855, reversing a decree of Baboo Doorgapersad Ghose,
Sudder Ameen of that district, dated 19th November 1853.*

Bisheshuree Debea, (Pauper Plaintiff,) Appellant,
versus
Bemola Debea and others, (Defendants,) Respondents.

*Moonshee Abbass Ales Khan, for Appellant.
Baboos Kishenkishore Ghose, Bungsheebuddun Mitter, and
Gobindchunder Mookerjee, for Bemola Debea, Respondent.*

Principal sud-
der ameen's de-
cision on point
of limitation,
with reference
to facts of case,
upheld.

THIS case was admitted to special appeal on the 17th March 1857, under the following certificate recorded by Messrs. C. B. Trevor and D. I. Money.

"Plaintiff, special appellant, sues for certain property belonging to her late husband. She says that altercation began between herself and the defendant in 1246, but from the beginning of 1247 she was dispossessed of all her property, except a small portion still in her possession: she therefore sues for possession, with wasilat, of the property of which she has been dispossessed, and to which she is by law entitled.

"The lower court gave her a decree; and the principal sudder ameen, on appeal, dismissed her claim, she, *on her own showing*, being out of court under the statute of limitations, her cause of action having arisen in 1246 B. E.

"Plaintiff now appeals specially, urging that, though the commencement of her altercation with defendant was in 1246, still her cause of action only arose in 1247 B. E., from the beginning of which year she was dispossessed of the property now sued for, and that, consequently, she is within time.

"We observe that plaintiff in her plaint states in effect that her cause of action arose in 1247 B. E., and that she only sues for meane profits from the beginning of that year. We, therefore, admit the special appeal, to try whether the order of the principal sudder ameen, dismissing plaintiff's claim, on the ground of the operation of the statute of limitations against her, *on her own showing*, should not be reversed, and the case remanded to him for investigation on its merits.

"Plaintiff being a pauper, the usual enquiry will be made into her pauperism previous to the issue of notice."

JUDGMENT.

The principal sudder ameen's decision in this case appears to be correct. The plaintiff's allegation is, that she quarreled with the defendant, Bemola, in Jeyt 1246, and demanded that an 8 annas share of certain property, which she alleged to have been hitherto held in joint ownership, but which was evidently at that time in Bemola's hands, should be made over to her; that Bemola, in presence of the principal people of the village, promised to make it over in the beginning of 1247, but failed to do so. The principal sudder ameen observes that, if the plaintiff's allegation of a promise to give up the property in 1247 had been proved, the plaintiff would unquestionably have been entitled to date her cause of action from that year; but that, as she has entirely failed to prove any such promise, limitation must run from the month of Jeyt 1246, since which time the defendant's possession has, on the plaintiff's own showing, been hostile. As the suit was instituted on the 24th Poos 1258, he consequently considered the hearing to be barred by the statute of limitations, and dismissed the suit. We affirm his decision, and dismiss the appeal, with costs.

THE 7TH MAY 1859.

C. B. TREVOR, Esq., Judge, and E. A. SAMUELLS and G. LOCH, Esqs.,
Officiating Judges.

Case No. 675 of 1858.

Special Appeal from the decision of Syud Ahmed Buksh Khan, Principal Sudder Ameen of Mymensing, dated 27th March 1858, reversing a decree of Baboo Boishtubchurn Dass, Moonsiff of Niklee.

Mahomed Zumeer Bhooya, (Plaintiff,) Appellant,

versus

Nusrut Khan and others, (Defendants,) Respondents.

Baboo Sreenath Dass, for Appellant, *Ex-parte*.

THIS case was admitted to special appeal on the 11th November 1858, under the following certificate recorded by Messrs. J. H. Patton and A. Sconce.

"This suit was instituted by petitioner to recover certain shares in three talooks, numbered 274, 275, and 11, and also in a shikmee talook. The moonsiff decreed to plaintiff 17½ gundahs in No. 274, 2-18-1-1 in No. 275, and 5-13-1-1 in both talook No. 11 and the shikmee talook. From this judgment, on the part of two defendants, Nusrut Khan and Budioozuma, an appeal was preferred; and on their appeal the entire decree was reversed.

Plaintiff sued for three parcels of land, and obtained a decree from the moonsiff. An appeal was preferred by parties interested in one parcel only, but the principal sudder ameen reversed the entire decree. Moonsiff's decision ordered to

stand as regards that portion of the decision against which no appeal was preferred, and case remanded as regards remaining portion, that proper issue may be tried.

"The ground of special appeal is, that Nusrut Khan and Budioozuma, by their answer, professed to have an interest in talook No. 274 only. No appeal having been preferred relative to the three other talooks, it is urged that the moonsiff's decision should be upheld.

"We observe that, on 25th May 1857, this case was once before remanded to the principal sudder ameen, to detail his reasons at large for reversing the moonsiff's entire decision, while the appellants before him were interested in only one out of the four talooks sued for. The second decision of the principal sudder ameen, Syud Ahmud Buksh Khan, is now before us. The order of this Court being embodied in the judgment, the principal sudder ameen appears fully to have understood the nature of the injunction sent to him, but appears to us to have again wholly failed to assign any reasons for throwing out the plaintiff's entire claim, while the appeal before him was confined to No. 274. He simply dismisses the plaintiff's claim, because the evidence to dispossession is not sufficient, but he fails to show how this remark is applicable to more than one of the talooks sued for. We accordingly admit the special appeal to try whether the moonsiff's order, with respect to talooks Nos. 275 and 11 and the shikmee talook, should not be affirmed.

"Next, with respect to No. 274, it is objected that the principal sudder ameen, with reference to the admissions made of the right of the plaintiff's father, has shown no good grounds for denying wholly the inheritance of his son, the plaintiff; nor, indeed, does he show how the rights of the defendants, who themselves admitted the existence of the father's title, were subsequently created. This point we also think should be considered when the first point is under consideration."

JUDGMENT.

We find the facts are correctly stated in the certificate. The two parties who appealed to the principal sudder ameen were only interested in talook 274, and no appeal was preferred against the moonsiff's decision in respect to the other property which the moonsiff had decreed to plaintiff. That portion of the principal sudder ameen's judgment which refers to this property must, therefore, be reversed, and the moonsiff's decision, with respect to it, affirmed.

The principal sudder ameen has dismissed the plaintiff's claim to talook 274, on the ground that he has not proved dispossession; but dispossession was not one of the issues in the case. Both parties stood upon their rights, the defendants alleging that they held from one Shanita Beebee, a wife of the plaintiff's uncle, and her daughter, and plaintiff denying in his replication that Shanita Beebee was his uncle's wife or had any power to dispose of the property. The case must, therefore, be remanded. The principal sudder ameen will

try the question of title at issue between the parties with respect to talook No. 274, and dispose of the case, which has now been twice remanded, without delay.

THE 7TH MAY 1859.

C. B. TREVOR, ESQ., Judge, and E. A. SAMUELLS and G. LOCH, ESQS.,
Officiating Judges.

Case No. 516 of 1857.

Regular Appeal from the decision of Baboo Panchanun Banerjee, Principal Sudder Ameen of Rajshahye, dated 21st November 1856.

Ranee Shamsounderee Debea, mother, and Prosonnocomar Mozoomdar, guardian of Purushnarain Roy, minor, (Defendants,) *Appellants,*

versus

Bhyrubnath Sandyal, for self and on behalf of Kishenmonee Debea and others, (Plaintiff,) *Respondent.*

Baboos Ramapersad Roy, Kishenkishore Ghose, and Shumbhoo-nath Pundit, for Appellants.

Mr. R. T. Allan, Moonshee Ameer Alee, and Baboo Bungshee-buddun Mitter, for Respondent.

Suit laid at Rupees 14,500.

THE plaintiff in this suit, Bhyrubnath Sandyal, brings an action against Ranee Shamsounderee Debea and her minor son, together with the guardian of the latter, to establish a title to two putnee talooks on the following allegations.

On the 13th Poos 1259, the zemindar of pergunnah Lushkurpore, Bhyrubhindernarain Roy, created a putnee talook called Dhobaparah, with an annual rent of rs. 1825, and sold the lease to plaintiff for rs. 4800. On the 22nd of the same month he sold him the lease of another putnee talook called Chitta, with a rental of rs. 935 for rs. 2562-8. The deeds of sale and the receipts for the consideration money were in both cases made out in the name of the plaintiff's mother, Kistomonee Debea, an arrangement for which no particular reason is assigned. The plaintiff continued in possession of these talooks, collected rents, and defended suits brought against the putneedar, until 1261 (1854), when he went on a pilgrimage to Juggurnath with his aunt Ranee Soorjomonee. On their way back, in June 1854, the ranee died, and the defendants, Ranee Shamsounderee Debea, who is the widow of Ranee Soorjomonee's adopted son, and Prosonnocomar Mozoomdar, the guardian of Shamsounderee's minor son, took advantage of plaintiff's absence to endeavor to dispossess him of his putnees. They gave out

A suit to establish a title to certain putnees purchased in the name of plaintiff's mother, in which the defendants alleged the benamsee trust to have been executed by plaintiff's aunt in the name of his mother, and claimed as her heir, decided on the evidence in favor of plaintiff, the benamsee trustee supporting his case, the title-deeds being in his possession, and the probabilities of the case in his favor.

that the putnees had been purchased by Ranees Soorjomonee in the name of her sister-in-law Kistomonee, and brought a criminal charge against Govindnath Lahooree, Anundchunder Sein, and other persons in the plaintiff's interest, of having forcibly broken open Soorjomonee's toshakhana, and abstracted her property and documents, upon being advertised by the plaintiff of her death. This charge, however, was dismissed by the magistrate, and the defendants then colluded with plaintiff's ryots and gomashtas, and induced them to withhold their rent, in consequence of which disputes occurred, and the magistrate called on the parties, under Act IV. of 1840, to establish their respective claims to possession, making the present plaintiff plaintiff in the suit.

He obtained a decree from the magistrate; but on appeal the judge, after recording some remarks on the general character of the zemindar, Bhyrubindernarain Roy, who had deposed in plaintiff's favor, directed that the putnees should be attached, and that, if the plaintiff did not institute a suit within three months, to establish his title to them, they should be made over to the defendants. The terms of this illegal order, of which plaintiff, with reason, complains, has left him no option, and he has accordingly instituted the present suit.

The plaintiff's mother, Kistomonee, was originally a co-plaintiff, but she has deceased in the course of the suit, and is now represented by the plaintiff himself. This, however, is of no consequence, as the case both of the plaintiff and defendants is, that Kistomonee had no interest in the property.

The defendants, in reply to the plaintiff's allegations, maintain that his assertion of having purchased the putnees with his own money is false; that he was in debt and dependent on his aunt Soorjomonee for his support; that Soorjomonee herself purchased the putnees with a view of devoting the property to the service of an idol at Muttra; and that she had two deeds drawn out in the name of her sister-in-law Kistomonee, because she was afraid that the Court of Wards would claim the property on behalf of her minor son. The business of the putnees, they admit, was carried on in Kistomonee's name, but the seal which bore Kistomonee's name was retained in Soorjomonee's own custody, and her servants were in possession, one Hurnath Lahooree being her agent and mooktear. On Soorjomonee's departure she left her property in charge of Govindnath Lahooree and Anundchunder Sein, and they, on hearing of her death, from the plaintiff, carried off to his house a quantity of property and the documents he now produces.

The principal sudder ameen decreed the case in plaintiff's favor, remarking that the validity of the plaintiff's claim, and the futility of the defendants' objections, were "clear to demonstration." From this judgment the defendants appeal.

They contend that, under the circumstances of the case, the main question for determination is, with whose money the purchase was effected, and that the plaintiff has failed to prove whence he derived the funds which he says he invested in these putnees. They point to the fact that, even plaintiff's witnesses depose to a portion of the rents having been paid through Hurnath Lahooree, a servant, they say, of Rancee Soorjomonee; and that the dakhilas filed bear his name. They challenge the conclusions which the principal sudder ameen has drawn from the evidence, oral and documentary. They object to his relying on the evidence of the zemindar Bhyrubindernarain Roy, as detailed in the magistrate's and judge's decisions of the Act IV. case, on the ground that the zemindar was then alive and might have been called by the plaintiff in the present suit. They quote Beesoo Sircar, whom they allege to be the writer of the deeds, and employed as a gomashita in the putnee mehals, together with numerous other witnesses, to prove that the purchase money was paid by Soorjomonee, and not by the plaintiff; and they cite others to show that Soorjomonee, and, after her death, they themselves, were in possession of the property.

After an attentive consideration of the evidence which has been laid before us by the pleaders for the contending parties, we have come to the conclusion that the judgment of the principal sudder ameen is correct, and must be affirmed.

The undisputed facts of the case are all in plaintiff's favor. The title-deeds of the putnee estate, together with the zemindar's receipts, are in his possession, and the benamee trustee herself comes into court to establish his title.

The attempt which the defendants have made to shake the presumption arising from plaintiff's possession of the title-deeds, by alleging that his agents had abstracted them from Soorjomonee's toshakhana, has failed altogether: for not only was the charge which the defendant brought against Govindnath and Anund in respect of that matter dismissed, but the principal deeds, it is clear, were filed in the foudaree court by Jeynath Chuckerbuttee, the mooktear of Bhyrubnath Sandyal, in an Act IV. case, on the 16th Poos 1260, and remained in court until 8th Jeyt 1261, that is, some time after the departure of Soorjomonee, when they were returned to the plaintiffs' mooktear—facts which are quite inconsistent with the defendants' allegations.

In addition to the title-deeds and receipts for purchase money, the plaintiff produces eleven receipts for rent from the zemindar, eight of which had been paid through Hurnath Lahooree, two through Rajkissen, and one through Jeynath Chuckerbuttee. These receipts are of the years 1259, 1260, and 1261. The defendants, on the other hand, can only show us two receipts, both of dates subsequent to the commencement of this dispute.

Two letters of the zemindar are also filed by the plaintiff, and other documents, to which it is unnecessary to refer.

The possession of these papers is strong *prima facie* proof of the plaintiff's possession of the property, and of the title being vested in him. It is not met by any documentary evidence of the slightest value on the part of the defendants; and although they cited the zemindar in the Act IV. case, for the purpose of proving the possession of Soorjomonee, they do not venture to call him on the present occasion.

The oral evidence which they adduce is not such as to make up for the absence of documentary proof. Of five attesting witnesses to the Dhobaparah deed, only one (Beesoo Sircar) testifies in their favor, and he, it is admitted, was prosecuted by the plaintiff for embezzlement before the suit commenced.

Of the witnesses to the chitta deed similarly we have only one, Burrall thannadar, who swears to the purchase having been effected by Soorjomonee.

The evidence of the treasurer and the majority of the defendants' other witnesses is that of men in the defendants' service, and of people who speak from hearsay. It can, consequently, avail the defendants little. They allege Hurnath Lahoorree, through whom several of the payments were made, to have been a servant of Soorjomonee's; but it appears that his testimony in the magistrate's and collector's courts was in favor of the plaintiff, and they do not call him in the present suit. It is to be observed also, that mere proof of the purchase money having come from Soorjomonee's treasury would be far from conclusive in the face of the facts disclosed in this case; for Soorjomonee and the plaintiff were living together, they were aunt and nephew, and she may either have given him the money or made some arrangement with him for its payment.

The probabilities of the case appear to us, further, to be against the defendants. It was natural for the plaintiff, if, as the defendants say, there were decrees against him, to take these putnees in the name of his mother, a person whom he could fully trust and whose property would descend to him at her death. A secret trust of this kind is of common occurrence. But it is not usual for one woman to create a trust in the name of another who is only connected with her by marriage, without taking from her an ikrar or acknowledgment of the nature of the transfer; and, as the principal sudder ameen observes, the motive alleged in this case has no foundation, neither the Court of Wards nor the minor having the power to interfere with the alienation for religious purposes of property purchased with the widow's own money.

The title and possession being *prima facie* with the plaintiff, and the defendants having failed to make out any case of their own, it is unnecessary to look further into the evidence which the plaintiff

has adduced : but we may mention that he produces proceedings of the criminal courts, which show that he was sued jointly with Kistomonee as putneedar prior to the departure of Soorjomonee, and defended the suits in his own name—a proceeding he would assuredly not have ventured on in Soorjomonee's presence, had she been, as the defendants contend, the owner and manager of the property.

The plaintiff also produces a mass of oral testimony in addition to his receipts, to prove the payment of the purchase money of the putnees from his own funds. We have no doubt on the evidence before us that Bhyrubnath Sandyal was the purchaser of the putnees ; and we therefore affirm the decision of the principal sudder ameen, and dismiss the appeal, with costs, against Rancee Shamsounderee and Prosonnocomar Mozoomdar.

THE 7TH MAY 1859.

H. T. RAIKES and A. SCONCE, ESQs., Judges, and H. V. BAYLEY, ESQ.,
Officiating Judge.

Case No. 577 of 1858.

Special Appeal from the decision of Mr. W. S. Seton-Karr, Officiating Judge of Jessore, dated 1st December 1857, affirming a decree of Baboo Oopendurchunder Nyaruttun, Principal Sudder Ameen of that district, dated 13th June 1857.

Dirpnarain Roy, (one of the Defendants,) *Appellant*,

versus

Keerutchunder Ghose, (Plaintiff,) and Issurchunder Ghose and others,
(Defendants,) *Respondents*.

Baboos Shumbhoonath Pundit and Poornochunder Roy and Mr. R. T. Allan, for Appellant.

Baboos Ramapersad Roy and Kishenkishore Ghose, for Plaintiff, Respondent.

AN application for the admission of special appeal was rejected on the 1st May 1858, under the following certificate recorded by Messrs. A. Sconce and J. S. Torrens.

"Petitioner was defendant in this case. It appears that, when the suit was pending in the first court, it had been referred to arbitrators for decision ; and according to the award rendered by the arbitrators, the case was, by the principal sudder ameen, finally disposed of.

"On appeal to the judge, petitioner urged that the assent given by his pleader to the arbitration did not bind him ; and the judge having rejected this plea, petitioner asserts now the same point as a ground for the admission of a special appeal.

With reference to a prior precedent, decrees of lower court set aside, and suit remanded. It was apparent that defendant had not authorised his pleader to refer his cause to arbitration, and had objected to that step in an early stage of the subsequent proceedings.

"The judge in his decree states that various steps, taken successively by the petitioner with a view to carrying out the pending arbitration, prove his consent to the proceedings and his condonation of any informality, if there be one, in his not signing a bond : and he adds, moreover, it appears that another award has been given by the same arbitrators at the same time, in favor of the same appellant, in which he has unhesitatingly acquiesced.

"We cannot doubt, therefore, that, in the opinion of the judge, from the facts before him, petitioner had assented to and ratified the act done by his pleader as an act done by himself. The arbitration reference therefore, under this finding, becomes the petitioner's reference, and the point taken appears to us to constitute no legal ground of special appeal. It is said that petitioner protested against the arbitration, but we are not shown that any such objection had been taken till after the award had been made.

"Petition rejected."

A review of the above order was admitted, on the 11th September 1858, by Mr. A. Sconce, under the following remarks.

"An application is before me for a review of the above order. The judge, it will be seen, admitting that the petitioner himself did not assent to arbitration, or, at all events, did not sign the arbitration bond, assumes this defect to be technical, and to have been cured by the petitioner's suffering the case to go on before the arbitrators and aiding in their adjudication. I observe that, in the case reported at page 629 of the Decisions of 1857, it was held that a pleader, without the consent of his principal, was not competent to choose arbitrators or sign an arbitration bond. It may, therefore, be contended, with respect to the present case, that the result of the arbitration cannot be legally binding on petitioner, both because he protested by petition against the reference, and because the reference into which he was erroneously led was opposed to the law.

"The question presents some doubts to my mind; and as I think the case should be heard by a full bench, I allow the review applied for, and admit the special appeal to be tried in the usual course."

JUDGMENT.

It is admitted, in this case, that the matter in dispute had been referred to arbitrators, so far as this special appellant was concerned, at the instance of his pleader, without the express authority of his principal; and it appears to us that the rule of law declared in the decision, reported at page 629 of the Decisions of 1857, must be adhered to. It was then held that, in cases falling within Sections IV. and V. Regulation XVI. of 1793, it was incompetent to a pleader, without the express authority of his principal, to choose arbitrators or sign the preliminary arbitration bond. It has been assumed by the zillah judge that the

special appellant, by his subsequent acts, that is, by carrying on his case before the arbitrators (as is allowed,) must be held to have ratified the reference originally made by his pleader without authority. But we think that the illegality of the arbitration cannot be cured because special appellant, for the protection of his own interests, did not wholly abstain from recognising the jurisdiction conferred upon the arbitrators. It seems to us that we must consider the arbitration as an act imposed on the defendant, special appellant, and that he did not lose his right to challenge in appeal the legality of the reference. Besides, there is the strongest presumption that special appellant had protested against the arbitration proceeding.

We are shown a petition presented by him to the principal sudder ameen, after the award had been made, in which an early objection taken by him to the competency of his pleader to sign the arbitration bond is referred to, and it is said that the pleader had reported the objection for the orders of the principal sudder ameen.

This statement of a fact within the principal sudder ameen's own knowledge is not contested by him: and the objection taken is allowed on the presumption of the subsequent acceptance of the arbitration by the objector.

We set aside both decrees, and remand the suit to the first court for re-trial.

THE 7TH MAY 1859.

C. B. TREVOR, Esq., Judge, and G. LOCH, Esq., Officiating Judge.
Petition No. 1820 of 1858.

Application for the admission of a Special Appeal from the decision of Mr. O. W. Malet, Judge of Beerbhoom, dated 21st July 1858, affirming a decree of Baboo Banceemadhub Shome, Sudder Ameen of that district, dated 15th December 1857.

Goonomonee Dassee, Plaintiff, Petitioner,
versus

Essanchunder Roy and others, Defendants.

Baboos Ramapersad Roy, Shumbhoonath Pundit, and Ashootosh Chatterjee, for Plaintiff.
Baboo Taruknath Sein, for Defendants.

IT is hereby certified that the said application is granted on the following grounds.

The petitioner sued to obtain possession of certain villages alleged to have been sold to her by the defendants, and to reverse a decision under Act IV. of 1840, and the order of the collector

Remanded to the judge, as he had taken no notice of certain important documentary evidence filed by the appellant.

rejecting her application for the mutation of names. The judge dismissed the claim, as he considered the bill of sale, under which the petitioner claimed, to be invalid, assigning, among other grounds for this conclusion, that the party who executed it was the guardian of a minor who could not sell the estate, except for necessities, and in the present case no necessity was shown to exist.

It is urged, in special appeal, *first*, that the judge's investigation is defective, for the judge has taken no notice of a bynanama, which was, in fact, the principal proof in the case. Two documents were executed, the bynanama, when rs. 3000 of the purchase money was paid, and the kubala, when the balance was paid : the latter document was merely corroborative of the other. If the bynanama be valid, it is immaterial whether the kubala be valid or not. *Second*, the judge's finding as to the incompetency of the vendor is applicable, if at all, to only one of the vendors, whereas the plaintiff purchased the property from several parties jointly. *Third*, the principal sudder ameen finds how the bank notes, alleged to have been paid by the plaintiff, were entered in the chullan of the Government revenue paid into the collector's treasury ; but the judge has taken no notice of this fact, which so strongly supports the plaintiff's case. Further, the judge takes no notice of this important fact, that all the title-deeds and other documents were in the possession of and filed by the petitioner, and that these documents, running in the names of the vendors, could only have come to the petitioner through them ; and, further, that petitioner has produced the receipts for the Government revenue for three years, a point not contested by the defendants. *Fourth*, the witnesses named by the petitioner were not examined. Some of those in attendance were examined, whose evidence the principal sudder ameen rejected ; and on the petitioner's application, that the others might also be examined, her request was refused.

As we find that the judge's decision rests entirely on the opinion come to by him regarding the bill of sale, and that he has omitted to take any notice of the bynanama, which is, in fact, as much as the kubala, a proof of the transaction between the parties, we remand the case for re-trial, directing him, after considering the evidence adduced in support of the bynanama, and weighing the other objections urged by the petitioner, to pass such orders as he shall think just and proper.

THE 7TH MAY 1859.

H. T. RAIKES, ESQ., Judge, and E. A. SAMUELLS, ESQ., Officiating Judge.

Petitions Nos. 1584 and 1586 of 1858.

Applications for Special Appeal from the decision of Mirza Mahomed Siddiq Khan, Principal Sudder Ameen of Sarun, dated 14th June 1858, affirming that of Mr. W. Wright, Sudder Ameen of that district, dated 29th December 1853.

Khajah Mahomed Ameer Buksh, Plaintiff,

versus

Syud Bussarut Hossein and others, Defendants, Petitioners.

Moulvee Murhumut Hossein, for Petitioners, Ex-parte.

IT is hereby certified that the said application is granted on the following grounds.

Case remanded; an issue raised on trial not having been disposed of.

The petitioners in these two applications were defendants in the courts below, and were sued by the plaintiff, special respondent, for possession of certain villages which the plaintiff alleged he had purchased jointly with the defendants, petitioners, but of which they had dispossessed him subsequently.

The plaintiff got decrees for possession in both courts below; and the special appeal is made on the ground that, although petitioners have throughout the case alleged that one of the villages claimed by the plaintiff, named Poorneeah, is not comprised in the property purchased, but constitutes a portion of their inherited property, neither of the lower courts has taken up and determined the point.

As we find that this question was distinctly raised by the pleadings, and also by the issues tendered in appeal in the appellate court, we are of opinion that the question should have been decided; and, as the respondent has been summoned and has failed to enter or appear here, we remand the case, that the matter may be taken up and enquired into by the lower appellate court, and a decision passed thereon. Ordered accordingly.

THE 8TH MAY 1859.

H. T. RAIKES and A. SCONCE, ESQs, Judges, and H. V. BAYLEY, ESQ.,
Officiating Judge.

Case No. 671 of 1858.

*Special Appeal from the decision of Mr. W. S. Seton-Karr, Officiating Judge of Jessore, dated 6th April 1858, reversing a decree of Baboo Anundchunder Banerjee, Sudder Ameen of that district, dated 22nd February 1855.*Rajah Prosonnonath Roy, (Plaintiff,) *Appellant,*
*versus*Ramdhone Mozoomdar and others, (Defendants,) *Respondents.*
Baboo Ramapersad Roy and Shumbhoonath Pundit, for Appellant.
Baboo Sreenath Dass and Mr. R. T. Allan, for Ramdhone Mozoomdar, Respondent.

Under the circumstances explained in the judgment, case remanded again, that lower court may re-try it, restricting its attention to the point of adjustment of rent, as before directed, without re-opening the question of the validity of a certain pottah, which point a competent court had already set at rest.

THIS case was admitted to special appeal on the 10th November 1858, under the following certificate recorded by Messrs. R. J. Colvin and G. Loch.

"The plaintiff, petitioner, sued to enhance the rent of the defendants, who claimed to hold their lands on a fixed jumma of sicca rs. 46-15, under a pottah received from the plaintiff's grandfather. On the 29th December 1851 the sudder ameen decided that the pottah was genuine, and dismissed the suit. An appeal was preferred to the judge, who remanded the case for re-trial, without entering into the reasons by which the sudder ameen supported his opinion. A special appeal was preferred to the Sudder Court, and the judge was directed, on the 30th August 1853, to recall the case to his own file, and to record a more full and complete decision. The case was, however, from some unexplained reason, sent over to the principal sudder ameen, who, on the 31st August 1854, declared the pottah invalid, and remanded the case to the sudder ameen to assess the lands. The sudder ameen, on the 22nd February 1855, assessed the lands at rs. 146-2-19, upon which the defendant appealed to the judge, who, on the 2nd January 1856, dismissed the petitioner's suit, on the ground that he could not sue for enhancement. From this order a special appeal was preferred to the Sudder Court, which, on the 4th June 1857, remanded the case for re-trial on its merits, overruling the opinion of the judge. The zillah judge has now entered into the whole merits of the case, and declared the pottah to be genuine, and has, consequently, dismissed the plaintiff's suit.

"The plaintiff, petitioner, now urges that the question of the validity of the pottah was decided by the principal sudder ameen in August 1854, when the case was remanded for the first

time; that it had been declared by him invalid, and no appeal from his decision on this point had been preferred to the higher court, and therefore his decision is final, and the judge was incompetent to re-open this point of the case and determine on the validity of that document. We admit the special appeal, to try whether, as the case was remanded by this Court on the 4th June 1857, to be tried on its merits, the judge was correct in taking up and deciding the question of the validity of the pottah, or whether the decision of the principal sudder ameen regarding that document was final or not."

JUDGMENT.

The judge has, apparently, misapprehended the order of this Court, when remanding the case on the 4th June 1857. The status of the case, when it came before the Court, in special appeal, was this. The sudder ameen had tried the case and held the pottah to be valid, dismissing the plaintiff's claim. An appeal was then preferred to the principal sudder ameen, who, in opposition to the opinion of the first court, held the pottah to be invalid; and the question of rate of rent having then to be decided, the principal sudder ameen remanded the case for determination on that point. The rates were then fixed, and again the defendant appealed. This time the case came before the judge, who, considering that none but an auction purchaser could enhance, dismissed the claim *in toto*. In special appeal, this Court pointed out the error of the judge, and directed him to try the case on its *merits*.

This order could not, of course, enlarge those merits beyond the points left for determination, which had then, by the previous decisions, become restricted to the amount of enhancement and rate of rent, but the judge has erroneously supposed it left him at liberty to re-open the entire controversy, and to again try the validity of the pottah. As, however, there had already been a decision by a competent appellate court on the validity of the pottah, and no question of law had arisen to allow of a special appeal at that time, or at least no special appeal was preferred, that judgment on the pottah had effectually closed further contest on that point, and the question of rates to be fixed alone remained. The judge therefore was clearly wrong in going further, and we remand this case, that he may confine his decision to the propriety or otherwise of the rates fixed by the sudder ameen in 1856.

THE 9TH MAY 1859.

H. T. RAIKES and A. SCONCE, ESQS., Judges, and H. V. BAYLEY, ESQ.,
Officiating Judge.

Case No. 717 of 1858.

Special Appeal from the decision of Mr. M. A. Shawe, Judge of Sylhet, dated 27th April 1858, reversing a decree of Baboo Umbikachurn Mitter, Moonsiff of Azmerigunge, dated 17th December 1857.

Joogulkishore Surma and others, (Plaintiffs,) *Appellants,*
versus

Rajbullub Surma and others, (Defendants,) *Respondents.*

Baboo Bhoobunmohun Roy, for Appellants.

Baboos Shumbhoonath Pundit and Unnodapersad Banerjee, for Rajbullub Surma, Respondent.

The judge put in issue the suit being barred by limitation; the proof of plaintiffs' alleged possession and dispossession; and plaintiffs' alleged lakhiraj title; but did not adjudicate the questions of limitation and lakhiraj title. The case was remanded for that purpose.

THIS case was admitted to special appeal on the 23rd November 1858, under the following certificate recorded by Messrs. C. B. Trevor and H. V. Bayley.

" Plaintiffs sued for possession of 1k.-1p.-5j. of land. They state that Obut Rai, plaintiffs' and defendants' ancestor, had a tenure of 11k. lakhiraj; that after his death that tenure was divided into 10a.-8p. and 5a.-4p shares; that when it was so held by plaintiffs and defendants in co-parceny, they made over in *bhoguttur* 1k.-1p.-5j. to one Shamram; that after Shamram's death his heirs left the land, and it became waste; and, eventually, in Assar 1260, defendants raised a cow-house for themselves upon it, and so dispossessed plaintiffs.

" Defendants deny that the land in suit was part of the 11k. of lakhiraj joint property derived from Obut Rai, but state that it is part of their separate mal talook *Kubeecha*, with which plaintiffs have no concern.

" The moonsiff decreed the case in plaintiffs' favor. The judge, on appeal, has held, that plaintiffs' possession or dispossession is not proved. The judge has also stated that, had the land been given in *bhoguttur* to Shamram, plaintiffs would have filed some documents to prove it, and he discharged plaintiffs' suit.

" We observe that it does not appear to be disputed between the parties that the land in suit was given to and held by one Shamram, but the question was, whether that land belonged to the joint lakhiraj tenure of plaintiffs and defendants, or to defendants' separate mal talook *Kubeecha*. This point does not seem to have been investigated by the judge, nor does he appear to have fully considered the documentary evidence on the record.

" We admit the special appeal to try whether the case should not be remanded to the judge for re-trial with reference to the above remarks.

JUDGMENT.

We observe, by a reference to the judgment, that the judge distinctly recorded, as the first issue, whether the suit was barred by the statute of limitations ; as the second issue, whether plaintiffs' possession and alleged dispossession were proved ; and, as the third, plaintiffs' alleged lakhiraj title. But the judge has merely found that plaintiffs' alleged possession is not proved. He has not stated whether in such finding he intended to hold, as it is argued by the pleader for respondents that he did, that the suit was barred by limitation ; nor has he recorded any finding whatever on the question of plaintiffs' title, which was clearly raised in the third issue. We, therefore, remand the case to the judge, that he may distinctly adjudicate each of the issues recorded, and then pass such final orders as he may think proper.

THE 9TH MAY 1859.

H. T. RAIKES and A. SCONCE, Esqs., Judges, and H. V. BAYLEY, Esq.,
Officiating Judge.

Case No. 555 of 1858.

Special Appeal from the decision of Baboo Taruknath Sein, Principal Sudder Ameen of the 24-Pergunnahs, dated 24th June 1857, affirming a decree of Baboo Obhoycoomar Dutt, Sudder Ameen of that district, dated 7th March 1856.

Bissonath Biswas, (Plaintiff,) Appellant,
versus

Lowlutoonissa Beebee and others, (Defendants,) Respondents.

Baboo Kaleeprosonno Dutt, for Appellant.

Baboo Shumbhoonath Pundit and Kishenkishore Ghose and Moonsthee Ameer Alee, for Respondents.

THIS application for the admission of a special appeal was rejected on the 29th January 1858, under the following certificate recorded by Messrs. A. Sconce and J. S. Torrens.

" This special appeal is preferred on the ground that the principal sudder ameen has made an imperfect investigation of the case. The plaintiff sued to set aside the survey proceedings, alleging that he was entitled to hold 53 beegahs in the village of Butaneah. The sudder ameen dismissed the case on two grounds : first, that in a former suit, when plaintiff had claimed 60 beegahs, he had been awarded only 20 ; and, next, that he had not shown possession in the lands now sued for within twelve years.

" In appeal to the principal sudder ameen he has modified this decision, dismissing plaintiff's claim altogether in respect to the difference between the 20 and the 53 beegahs, but nonsuited him as to the rest, as, from its not being defined in what part of the

Where plaintiff was unable to show situation or boundary of the land formerly decreed to him, and for part of which he sued as erroneously awarded by the survey officers to another party, lower court was right in nonsuited his case.

53 beegahs claimed in the whole it lay, he, the principal sudder ameen, could not determine as to whether it formed the lands formerly decreed to plaintiff. We can see no reason to interfere with the judgment on the appeal from plaintiff. The conclusion of the principal sudder ameen, as to the result of the former suit, having shown that he could not claim beyond the 20 beegahs, was fully borne out by reference to the former suit, under which circumstances he passed the orders as to the rest, which were the most favorable to the plaintiff which, as his suit was preferred, could have been given. Dismissed with costs."

A review of the above order was admitted on the 4th September 1858, by Mr. A. Sconce, under the following certificate.

"An application is made for a review of the above order on the following grounds. This suit is laid to recover beegahs 53-3-3, belonging to plaintiff's village Butaneah; and it appears that once before, plaintiff's ancestor, having sued for 60 beegahs on account of the same village, got a decree for beegahs 20-14 on the 16th March 1815. Accordingly, it is urged that, since the principal sudder ameen admits the effect of this old decree, and, in order to meet the statement of plaintiff, petitioner, that out of the portion beegahs 20-14 formerly decreed he now holds beegahs 6-13 only, non-suited the present suit in so far as the possession, covered by the earlier judgment, may have been subsequently interrupted, the principal sudder ameen, instead of recording an order of nonsuit, should have remanded the suit to the first court, that the claim of plaintiff might be tried with respect to that portion of the land which was comprised in the judgment of 1815.

"The reason assigned by the principal sudder ameen for not remanding the case for the purpose mentioned, appears mainly to have been adopted because the plaintiff had omitted to mention the old decree in his plaint. But if it be possible to determine, from the evidence adduced or adducible, the specific portion of beegahs 20-14, which the decree of 1815 adjudged to the plaintiff's ancestor, probably in this action the fact of the asserted seizure by defendants of any part of that land may, with propriety, be enquired into. This is of more importance, as one object of the suit is to set aside a revenue award, and from the time which has elapsed, plaintiffs may not be entitled to benefit by the order of nonsuit. I therefore admit the special appeal, to try whether the case should not be remanded to the first court for the purpose above indicated."

JUDGMENT.

The pleader of special appellant has not been able to show us that the record affords any proof of the situation or boundary of the lands of the decree alluded to in the certificate. In fact, it does

not appear that a decree for 20 beegahs was really passed, but only that an intimation was recorded in a real suit, that special appellant's predecessor in the estate held 20 beegahs and some cottahs in the village of Butaneah, and was at liberty to make arrangements for leaving them, &c., but the decree itself affords no such data as will allow of the Court tracing these 20 beegahs from among the 53 beegahs now made subject of the present suit.

Under these circumstances we cannot assist the special appellant, and the order of nonsuit must stand, with costs of this special appeal against the appellant.

THE 9TH MAY 1859.

H. T. RAIKES and A. SCONCE, Esqs., Judges, and H. V. BAYLEY, Esq.,
Officiating Judge.

Case No. 560 of 1858.

Special Appeal from the decision of Mr. H. M. Reid, Officiating Judge of East Burdwan, dated 26th February 1858, reversing a decree of Mr. H. S. Thompson, Principal Sudder Ameen of that district, dated 29th December 1856.

Bishonath Roy and others, (Defendants,) *Appellants,*
versus

Chundeechurn Biswas, (Plaintiff,) *Respondent.*

Buboo Obhoychurn Bose and Moulvee Murhumut Hossein, for Appellants.

Buboo Buneemadhub Banerjee, for Respondent.

THIS case was admitted to special appeal on the 7th September 1858, under the following certificate recorded by Messrs. C. B. Trevor and H. V. Bayley.

Lower court's judgment upheld in the award of costs upon certain *pro forma* defendants.

"Defendant Bishonath Singh Roy and others were, in a case in which they were *pro forma* defendants only, and did not appear, and in which Chundeechurn Biswas was plaintiff and Gungamonee Dasse and others defendants, saddled with plaintiff's costs by the judge. They now appeal specially, urging that, under these circumstances, they should be released from the payment of costs. We admit the special appeal to try the point."

JUDGMENT.

We have no ground for interfering in this case. Special appellants had not appeared below at all; and, therefore, on their part, no direct plea was before the lower court, which the principal sudder ameen can be considered to have overlooked. The principal sudder ameen's order generally runs to make defendants answerable for the plaintiff's costs; and whether that order was on the

merits right or wrong, we have no means of judging, without going into an issue which this appeal does not raise.

Special appeal dismissed, with costs.

THE 9TH MAY 1859.

H. T. RAIKES and A. SCONCE, ESQS., Judges, and H. V. BAYLEY, ESQ.,
Officiating Judge.

Case No. 490 of 1858.

Special Appeal from the decision of Baboo Oopendurchunder Nyaruttun, Principal Sudder Ameen of Jessore, dated 29th January 1858, affirming a decree of Moonshee Gholam Abed, Moonsiff of Jheenaيدا, dated 30th March 1857.

Muthooranath Koond, (one of the Defendants,) *Appellant,*
versus

Kishennath Bose and others, (Plaintiffs,) and Ramdhone Manjee
and others, (Defendants,) *Respondents.*

Baboos Unookoolchunder Mookerjee and Ashootosh Chatterjee,
for Appellants.

Baboos Jugudanund Mookerjee and Sreenath Dass, for (Plaintiffs,) Respondents.

THIS case was admitted to special appeal on the 2nd August 1858, under the following certificate recorded by Messrs. C. B. Trevor and H. V. Bayley.

The ground of special appeal not having been urged in the lower appellate court, appeal rejected.

"In this case plaintiff sued for possession of some land and a khal, and for mesne profits.

"On the 11th September 1855 the moonsiff gave plaintiff a decree for a portion of his claim only.

"The plaintiff did *not* appeal from this decision, or prefer objection to so much of it as was against him.

"Defendants, however, appealed, and on that appeal the judge remanded the case for further enquiry.

"The moonsiff on this remand decreed the whole of the plaintiff's claim, including that portion which had been given against him, and in respect to which plaintiff had preferred no appeal.

"The defendant appeals specially, urging that, as plaintiff did not appeal in respect to so much of the moonsiff's decision of the 11th September 1855, as rejected a portion of his claim, that portion cannot, by the subsequent decisions of the moonsiff and principal sudder ameen, be decreed to him (plaintiff).

"We admit the special appeal to try this point."

JUDGMENT.

In this case the plaintiff sued in the moonsiff's court for four parcels of land, the first containing 15½ cottahs, the second 1½ cottahs, the third 9½ cottahs, and the fourth 3½ cottahs.

That court decreed 6 cottahs $5\frac{1}{2}$ chittacks on account of the first and second parcels jointly, $9\frac{1}{2}$ cottahs (the total claimed) on account of the third parcel, and up to a certain red line in a map of the disputed land for the fourth parcel.

The defendants appealed, and the result was that the case was remanded for re-trial *de novo*. On that re-trial the plaintiff's suit was decreed for his whole claim, without modification.

The defendants again appealed, urging that the second decision of the moonsiff was contrary to the first, and various pleas on the general merits, but the lower appellate court upheld the second decision of the moonsiff.

The special appellant, defendant, now urges that, as plaintiff did not appeal from that portion of the moonsiff's first decision, which decided the plaintiff's claim to a modified extent only, the plaintiff cannot have the benefit of a decree for his whole claim, obtained by a second decision on remand on the appeal of defendants.

This plea, we observed, had not been specifically urged in the grounds of appeal of defendants from the moonsiff's second decision, nor then made a clear and distinct issue by defendants as it might have been. We, therefore, think it is too late to be admitted as a ground of special appeal at this stage, and dismiss it accordingly.

THE 9TH MAY 1859.

H. T. RAIKES and A. SCONCE, ESQs., Judges, and H. V. BAYLEY, ESQ.,
Officiating Judge.

Case No. 136 of 1857.

Regular Appeal from the decision of Baboo Punchannun Banerjee, Principal Sudder Ameen of Rajshukhye, dated 18th August 1856.

Bipranath Sandyal and others, (Defendants,) *Appellants,*
versus

Ramanath Tagore and others, (Plaintiffs,) *Respondents.*

Moonshee Ameer Alee and Baboo Shumbhoonath Pundit, for Appellants.

Baboos Ramapersad Roy, Kishenkishore Ghose, Unookoolchunder Mookerjee, Ashootosh Chatterjee, and Ashootosh Dhur, for Respondents.

Suit laid at Rupees 7793-3.

THE plaintiffs in this action are proprietors of an estate named Dehee Shahazadpore, situated within pergunnah Tosopshahee, and defendants proprietors of an estate named Dehee Surroitoil, within favor, was correct, and affirmed accordingly.

On the evidence adduced by both parties as to the disputed piece of

the same pergunnah. The estate Shahazadpore was purchased at a sale made for arrears of revenue on the 19th September 1834, in the name of one Guggutchunder, and from him passed to Baboo Dwarkanath Tagore ; and the object of the suit is to acquire possession of khadas 97-6-4-3, described as kismut Jameeratah, which, according to plaintiffs, was put into the possession of Baboo Dwarkanath Tagore subsequent to the revenue sale as portion of his estate, and from which he was subsequently ousted under an order made by the sessions judge on the 18th February 1846, in a case tried by the magistrate under Act IV. of 1840. Defendants, on the other hand, allege that the disputed land, called by them chuck Jameeratah, belongs to their estate Dehee Surrotil. Thus, while both sides call the disputed land by the same name, plaintiffs distinguish it as a kismut, defendants as a chuck.

The principal sudder ameen, holding plaintiffs to have proved their case, has given judgment in their favor ; and this appeal comes before us on behalf of those among the defendants who hold two-thirds share of Dehee Surrotil.

The course taken, no doubt rightly, by the appellants' pleaders, before us, is to put plaintiffs to the proof of their title, and to contend that, upon the evidence adduced, they have not made out their case.

On the part of plaintiffs we have, first, evidence intended to show that, before the revenue sale of 1834, the rents of the disputed land had been collected by the proprietor of Shahazadpore ; that Baboo Dwarkanath Tagore was formally put in possession of the land after the revenue sale ; and that his possession was undisturbed till disputes broke out about ten years later, which terminated in the proceedings held in the criminal courts, the magistrate, in the first instance, affirming the plaintiffs' possession, but the sessions judge, on appeal, the possession of defendants. Three witnesses, who had been entertained in the service both of the former proprietor and of Baboo Dwarkanath Tagore, speak to the possession of the land, within their knowledge, having been enjoyed by these persons ; they show that an ameen, deputed by the civil court under the provisions of the sale law, Regulation XI. of 1822, had put the purchaser in unequivocal possession ; and they attest the accounts of collection, which they themselves rendered to the purchaser.

The next item of proof offered by plaintiffs arises from the proceedings held before a commissioner, who had been appointed under Clause 2, Section XXVIII. Regulation XI. of 1822, to put the purchaser in possession of certain lands adjoining those now in dispute. As to the site or boundaries of the land now sued for, we have no contest. It appears to form one compact lot, and it lies on the east side of a river named Hoorasagur, being bounded on the north and east by the village of Goodeebaree. But the land

which formed, on the 3rd March 1838, the subject of adjudication by the commissioner referred to, lay on the west bank of the Hoorasagur river, right opposite to the land called by the plaintiffs kismut Jameeratah. We have a map of the localities prepared by the commissioner; and an entry set down in this map, east of the Hoorasagur, on the spot covered by the land now claimed by plaintiffs, is taken to corroborate their title. The entry referred to describes the land as Jameeratah, the property of Baboo Dwarkanath Tagore. Now we would add, that the grounds of the commissioner's adjudication respecting the land lying west of the river, which formed the subject of special enquiry before him, appear to us to indicate, even more conclusively than the map, that not only the land west, but the land east of the river was ascertained to constitute at that time portion of the estate Shahazadpore, belonging to Baboo Dwarkanath Tagore. The land under enquiry in 1838 was called simply Jameeratah: it is described by the commissioner as newly formed land, and it was considered by that officer to belong to the Shahazadpore estate, because it lay opposite to the village of Jameeratah on the east side of the river, and because he regarded it as an accretion devolving on the proprietor of Shahazadpore to counterbalance the loss by diluvion, which he had suffered on the east bank of the river. These proceedings were held rather more than three years after the revenue sale; and though they may not in themselves furnish proof of the constitution of the Shahazadpore estate before the sale, the value we attach to the record is, that it furnishes evidence of the recognition of the Jameeratah land, east of the river, being then vested in the proprietor of Shahazadpore.

But the same proceedings supply another piece of evidence of an important character. The village of Goodeebaree, we have already said, lies to the north and east of the land now litigated. It forms a separate estate, and belongs neither to Shahazadpore nor Surrotil, but, nevertheless, it belongs to some of the appellants now before us; and we are shown a petition presented on behalf of the proprietor of Goodeebaree to the commissioner, in which the position of Goodeebaree and of Jameeratah, on the east of the river Hoorasagur, is described, and in which the villages chuck Jameeratah, Jupseebaree, and Basra, are said to form one continuous boundary on the west side of the river. There then is an apparent admission as regards the case then before the commissioner, that the Jameeratah land, south of Goodeebaree and east of the river, belonged to Shahazadpore, and the express statement, that chuck Jameeratah, which name defendants (appellants) applied to the land now sued for, lay to the west of the river. It is true that the proprietor of Goodeebaree had not in 1838 purchased the estate Surrotil, and that the appellants are not to be bound, on a question of right, to a statement made under

a different interest and in a different contest. This information, and such like pleas, may be urged to rebut the statement ; but we are quite competent to look to the petition as an item of evidence affecting the issue of fact now before us ; and seeing that it came from a proprietor, whose local knowledge is presumable, the statement that chuck Jameeratah lay west of the Hoorasagur is irreconcilable with the assertion now made, that the disputed land, which lies east of that river, is chuck Jameeratah, and in that sense is corroborative of the plaintiffs' title.

Such is the material evidence by which the decision of the principal sudder ameen has, in this case, been determined, and it is wholly unshaken by appellants. The latter on their part in fact adduce no evidence at all to support their own title. Two kuboolyuts were referred to, and also certain bills of sale relative to an indigo factory situated in the disputed land ; but these papers are unattested by evidence, and we are unable to connect these documents with the disputed land, or to educe from them any thing like information or proof.

We dismiss the appeal, with costs.

THE 9TH MAY 1859.

H. T. RAIKES and A SCONCE, Esqs., Judges, and H. V. BAYLEY, Esq.,
Officiating Judge.

Case No. 500 of 1858.

*Regular Appeal from the decision of Baboo Taruknath Sein,
Principal Sudder Ameen of the 24-Pergunnahs, dated 29th
June 1858.*

Doorgapersad Roy Chowdhree, (Plaintiff,) Appellant,

versus

Tarapersad Roy Chowdhree, (Defendant,) Respondent.

*Baboos Ramapersad Roy, Shumbhoonath Pundit, and Bungshee-
buddun Mitter, for Appellant.*

Baboo Chundernath Chatterjee, for Respondent.

Suit laid at Rupees 23,294-9a.-16g.-2c.

Where a decree was passed in A's favor, but reversed by the Privy Council on their construction of a deed of compromise between A and his brother B, as to distribution of their uncle's property, and, subsequently to the first decree, A obtained a second for interest on the principal decreed in the first, and, notwithstanding the Privy Council's order on the appeal, B was unable to obtain review of the second decree, and after a time filed a suit for its reversal, the Court concurred with the lower court, that no new ground of action had been raised, and the suit was barred by Section XVI. Regulation III. of 1793 ; but intimated that the second decree having never been specially appealed, it was open to B to request a review thereof by the zillah court.

PLAINTIFF and defendant in this case are brothers, and, on the death of their uncle Rajnarain, the plaintiff claimed to succeed to his property under a will, to the exclusion of his brother Tarapersad,

and sued a debtor to the estate named Shamapersad Nundee. In that suit Doorgapersad got a decree for the debt, with interest to date of suit; and while an appeal from that decree was pending in the higher court, Doorgapersad and his brother Tarapersad (the latter having disputed the will) came to a compromise respecting their shares and interests in the uncle's property, by which Tarapersad consented to take a 6-annas share of the entire estate left by the deceased.

Doorgapersad having come to a settlement with Shamapersad Nundee regarding his debt, whereby he released the debtor from payment of some part of it, Tarapersad, considering himself injured by such arrangement, sued Doorgapersad for a 6-annas portion of the original debt as decreed to him. The suit so brought resulted in a decree in Tarapersad's favor for principal without interest; and from this judgment both the brothers appealed. The appeal also terminated in favor of Tarapersad, and was passed on the 15th April 1841. The case was then appealed to the Privy Council; and that Court, looking to the terms of the compromise entered into by the brothers as to the distribution of the family property, declared Tarapersad entitled to receive from his brother Doorgapersad 6 annas of such debts only as were actually realised by him on account of their uncle's estate, Doorgapersad being bound to account to him to that extent only. The decree of the Privy Council was passed in June 1848.

It happened, however, that, besides the suit brought against his brother by Tarapersad for his full share of Shamapersad Nundee's debt, a second action was instituted by him against Doorgapersad in 1842, for the interest accruing on the principal claimed in the first suit, during the time of its pendency in court, that is to say, for a period of some eight years and three months; and when this suit was dismissed in the first court in 1843, he succeeded in getting a decree in the appellate court in the following year, and eventually realised some rs. 11,000 in satisfaction of the judgment. Doorgapersad tried to get this judgment set aside in special appeal, but his application was rejected by the Sudder Court on the 24th July 1847. Then came the Privy Council decree in 1848 to the tenor already stated; and on the ground of the principle therein enunciated as to the liability of Doorgapersad to account to his brother to the extent of 6 annas of his receipts only, an application for a review of judgment was filed in this Court by Doorgapersad's pleader, and admitted by Sir Robert Barlow; but on the special appeal so admitted coming up for hearing before the full bench of the Court, it was finally rejected on the 11th August 1853. Doorgapersad then went to the judge's court with an application for review of the judgment passed by that officer in 1844, representing the obvious inconsistency of the judgment then passed for interest

accruing on a claim which the Privy Council's decision held was untenable, and praying the court which passed it to follow the principle enunciated by the Privy Council in 1848. This application was also refused on the 1st March 1854, partly on the ground of lapse of time, and, generally, in consequence of the Sudder Court having refused the application of special appeal on the occasion above referred to.

The present suit was then instituted. It has for its object the recovery from Tarapersad of the amount, with interest, which had been realised from plaintiff by Tarapersad in execution of the judge's decree passed in 1844; and the plaintiff assumed as his ground of action, that the judgment of the Privy Council has, by its own interpretation of the deed of compromise, established the rights of the parties on a new basis, and on the right so acquired plaintiff grounds his title to recover from defendant such sums of money as have been forced from him in opposition to the ruling of that high authority.

The principal sudder ameen has held that the Privy Council decree can give no new right of action, and that, as the present suit is identical with that instituted by the defendant Tarapersad, in which a decision was passed by the judge in 1844, now become final, the present action is barred by Section XVI. Regulation III. of 1793.

In appeal from this decision, Baboo Ramapersad Roy has argued that this suit is not one and the same with that decreed in 1844. The pleader for the appellant admits that the claim in that action by Tarapersad was for the interest accruing on the debt due from Shamapersad Nundee, during the pendency of Tarapersad's claim to realise that debt from Doorgapersad, and that the object of the present suit is to recover the amount which Tarapersad was able, under cover of the decree, to realise from the present plaintiff. But he contends that, as the decree of the Privy Council was not then passed, no absolute recognition of their respective rights under the deed of compromise, as defined by the Privy Council, had been made imperative upon them; but when that decision definitely determined the true terms and conditions of the original compromise, *new* rights and obligations arose, which the parties were bound to conform to; that by these the plaintiff is under obligations to account to the defendant to the extent of 6 annas of his actual receipts on account of the estate of his deceased uncle, while the rights of the defendant are limited in the same proportion. Defendant having then under cover of his decree taken from plaintiff sums of money for which plaintiff cannot be made accountable under the compromise agreed to, he sues to recover, and grounds the action on the *new* rights acquired by the Privy Council decree; and as the question in this suit is, whether he has now acquired these rights as assumed, a new controversy is raised, and a new issue proposed

which was not before the Court in the former suit, and on which the pleader argues that his client is entitled to a hearing.

JUDGMENT.

Now it is impossible not to see that the plaintiff has been subjected to much injustice by the decree which was passed against him in the zillah court in 1844, and that under its operation he has been made to pay upwards of rs. 11,000 as interest upon money, for which, it has been judicially declared, no personal liability attaches to him. But, at the same time, it is equally clear that the money so taken was taken by legal process, and is only recoverable by such legal measures as can be made to bear upon the decree under which that legal process issued. This cannot possibly be done through the action of a new suit. We have no hesitation, therefore, in saying, when it is apparent that the real object of a suit is to recover money from the defendant of the suit, on the ground that it was taken by the enforcement of a decree passed with that very object and intent against the plaintiff, but that the decree was in itself wrong and unjust, that such suit cannot be maintained. Neither do we see any force in the arguments of the pleader as to the plaintiff having acquired new rights, and that fresh obligations have been imposed upon the defendant in this action by the Privy Council decree. The decree itself does not profess to do any thing of the kind. It merely professes to give effect to the compromise between the brothers, as they themselves were bound to do, by enforcing its original terms and conditions. It determines the practical effect of those conditions as regards the circumstances of the particular case then before the Court, but such determination is not declaratory of new rights and obligations but of those which were co-existent with the execution of the document which of itself called them into existence.

We cannot, therefore, concur with appellant's pleader, that the Privy Council decree has given plaintiff any new ground of action, and agree in the finding of the principal sudder ameen that this suit is barred by Section XVI. Regulation III. of 1793, and consider that this appeal must be rejected, with costs.

Although our duty obliges us to reject this suit for the reasons above given, we think the plaintiff should not be deprived of any remedy which the law leaves open to any one, who has a fair claim to have a judgment re-considered, on the ground of error or miscarriage on the part of the court which passed the judgment. This remedy the law provides by an application for a review of judgment; and as the decision passed by the zillah judge in 1844 has not been touched in special appeal by the Sudder Court, the judge was in error in holding the review applied for in 1854 to be inadmissible. There is then, we believe, no legal bar to the plaintiff's

reiterating his application, or to the zillah court's (if satisfied of its justice) granting the same.

THE 9TH MAY 1859.

C. B. TREVOR, Esq., Judge, and G. LOCH, Esq., Officiating Judge.

Petition No. 124 of 1859.

Application for Special Appeal from the decision of Mirza Mahomed Siddiq Khan, Principal Sudder Ameen of Scrun, dated 17th November 1858, reversing that of Moulaee Alee Buksh, Moonsiff of Pura, dated 29th April 1857.

Koowur Dowlut Singh, Plaintiff, Petitioner,
versus

Ramsurun Singh, Defendant, Opposite Party.

Moonshee Ameer Alee and Baboo Kishenkishore Ghose, for Petitioner, Ex-parte.

Case remanded to the principal sudder ameen, in order that he may examine the whole evidence on the record, both documentary and oral, as to the right and possession of the parties before him, and pass whatever decision may to him seem just and proper.

IT is hereby certified that the said application is granted on the following grounds.

Koowur Dowlut Singh, plaintiff, petitioner, sued Ramsurun Singh for the confirmation of his right to the possession of a small portion of land, amounting to 4 biswas 4 dooms, and for the demolition of a wall which defendant had built thereon. He claimed the land as belonging to the village of Amrah. The defendant alleged that the land was his, had always been in his possession, and was within the village of Dhurmpore Jaffir.

The lower court, looking to all the evidence, both documentary and oral, filed by the parties in suit, decreed plaintiff's claim. On appeal, the principal sudder ameen reversed that decree and dismissed the claim of the plaintiff.

Plaintiff now appeals specially, urging that the investigation of the principal sudder ameen is defective, inasmuch as, instead of looking to all the evidence produced in the case, he has attended only to one decision passed by the principal sudder ameen of the same district on the 28th December 1843—a decision which refers to land other than the present, and cannot thereby be in the nature of evidence regarding the matter now in dispute.

We observe that the principal sudder ameen relies chiefly on a map which was filed in a suit decided on the 28th December 1843. That suit was regarding land other than that in dispute, and the map simply shows that the land now sued for, though situated in plaintiff's village, is adjacent to defendant's house, and at some distance from that of the plaintiff. On this ground alone the principal sudder ameen has passed a decree in favor of the defendant, and dismissed plaintiff's claim. This decision is evidently

defective. We therefore remand the case to the principal sudder ameen, directing him to examine the whole evidence on the record, both documentary and oral, as to the right and possession of the parties before him, and, after having done so, and weighed it attentively, to pass whatever decision may to him seem just and proper.

THE 9TH MAY 1859.

J. H. PATTON, ESQ., Judge, and E. A. SAMUELLS, ESQ., Officiating Judge.

Petition No. 237 of 1859.

Application for Special Appeal from the decision of Mr. A. Davidson, Principal Sudder Ameen of Midnapore, dated 13th December 1858, affirming that of Moulvee Darasutollah, Moonsiff of Nugua, dated 27th December 1856.

*Rajah Nundlall Roy, Plaintiff,
versus*

Rajun Berah, Defendant.

Gobindpersad Chuckerbuttee and another, *Third Party*, Petitioners.
Moulvee Syud Murhamut Hossein, for Petitioners.
Mr. R. T. Allan, for the Opposite Party.

It is hereby certified that the said application is granted on the following grounds.

The plaintiff sued in the collectorate for arrears of rent. His suit was dismissed. He then preferred a similar suit in the moonsiff's court, and there obtained a decree. The defendants appealed to the principal sudder ameen; and he, on the ground that another party had established a title to the land held in plaintiff's possession, directed that this decree should not be put in force. On special appeal to this Court, the suit was remanded on the 28th September last, it appearing that the decision in favor of the third party had been appealed against, and the Court considering the plaintiff, as the party in possession, entitled to the rents until his adversary was put in possession by the civil court. On the case going back to the principal sudder ameen, it seems he understood it as prohibiting his interference, and affirmed the decision of the moonsiff without investigation. The defendants, who were appellants in the principal sudder ameen's court, appeal specially against this order, and urge their right to be heard on the merits.

We find their appeal to the principal sudder ameen was not confined to the point decided by this Court in September last, but was generally directed against the validity of the plaintiff's claim.

Case remanded, the lower court having misunderstood the effect of a previous order of remand.

The appellants are entitled to a decision on these general points. The principal sudder ameen is mistaken in supposing that the Court intended to debar him from this investigation. The case will therefore be replaced on the file of the principal sudder ameen, who will dispose of the appeal of the petitioners on its merits.

THE 9TH MAY 1859.

J. H. PATTON, ESQ., Judge, and E. A. SAMUELLS, ESQ., Officiating Judge.

Petition No. 238 of 1859.

Application for Special Appeal from the decision of Mr. A. Davidson, Principal Sudder Ameen of Midnapore, dated 13th December 1858, affirming that of Moulvee Darasutoollah, Moonsiff of Nugwa, dated 26th December 1856.

Rajah Nundlall Roy, *Plaintiff,*
versus

Narain Pattur, *Defendant.*

Gobindpersad Chuckerbuttee and another, *Third Party*, Petitioners.

Moulvee Syud Murhumut Hossein, for Petitioners.

Mr. R. T. Allan, for the Opposite Party.

See preceding case. FOR grounds of admission to special appeal, see petition No. 237 of 1859.

THE 10TH MAY 1859.

A. SCONCE, Esq., Judge, and H. V. BAYLEY, Esq., Officiating Judge.
Application for Special Appeal from the decision of Baboo Kassissur Mitter, Principal Sudder Ameen of Hooghly, dated 3rd December 1858, affirming that of Syud Moazzum Hossein, Moonsiff of Pundooah, dated 19th December 1857.

Petitions Nos. 84 and 85 of 1859.

Chunderkanth Mookerjee and another, *Plaintiffs,*
versus

Issurchunder Mozoomdar, *one of the Defendants,* Petitioner.
Baboos Kishenkishore Ghose and Obhoychurn Bose, for Petitioner.
Baboo Dwarkanath Mitter, for Plaintiffs.

Petition No. 85 of 1859.

Chunderkanth Mookerjee and another, *Plaintiffs,*
versus

Lukheemonee, *one of the Defendants,* Petitioner.
Baboos Kishenkishore Ghose and Obhoychurn Bose, for Petitioner.
Baboo Dwarkanath Mitter, for Plaintiffs.

THESE two applications refer to a suit which, in the absence of the petitioners, had been decided by the moonsiff of Muhanad. In the first instance the suits in question had been filed in the sudder moonsiff's court, and afterwards were transferred to the moonsiff of Muhanad for trial. We are shown that, on a petition being presented to the judge by Lukheemonee, praying that the transfer of the suit might be stayed, the judge directed the suit to be retained by the sudder moonsiff; and it appears that, on a re-distribution of the moonsiff's jurisdiction being authorised by Government, this case, with others, was sent to Muhanad. Under such circumstances it appears to us that the petitioners may have been taken by surprise in the transfer of the suit, after an express order had been passed to retain it on the file of the sudder moonsiff; and, setting aside both decrees, we remand the case that it may be reheard by the first court (at Muhanad) in the presence of the petitioners.

Case remanded, having been transferred from one moonsiff's file to another unawares to petitioner.

THE 11TH MAY 1859.

C. B. TREVOR, Esq., Judge, and E. A. SAMUELLS and G. LOCH, Esqs,
Officiating Judges.

Case No. 784 of 1858.

Special Appeal from the decision of Mr. H. M. Reid, Officiating Judge of East Burdwan, dated 25th May 1858, reversing a decree of Baboo Muddungopal Shome, Moonsiff of Indoss, dated 22nd April 1857.

Ramnarain Bural and others, (Defendants,) *Appellants,*
versus

Kenaram Bural and others, (Plaintiffs,) and Degumber Bural,
(Defendant,) *Respondents.*

Baboo Jugudanund Mookerjee, for Appellants.

Baboos Kishenkishore Ghose and Obhoychurn Bose, for (Plaintiffs) Respondents.

Where the question of limitation is involved in the main issue of the validity of the plaintiffs' title, and the merits of the case have been fully investigated in the lower court, it is unnecessary for the appellate court, in reversing the order of dismissal on the ground of limitation passed by the lower court, to remand the case for a decision on the merits.

THIS case was admitted to special appeal on the 22nd December 1858, under the following certificate recorded by Messrs. J. H. Patton and H. V. Bayley.

"The judge records as follows:—'The moonsiff has now dismissed the suit as barred by the statute of limitations, and the issue for trial in appeal against that order is, whether the law of limitation applies to the appellants' case or not?' The judge proceeds to overrule the plea of limitation, and to decide the case upon its merits, giving a decree for possession and wasilat.

"The defendants appeal specially, urging that, in a case like this, when the lower appellate court has held limitation not to apply, it was its duty thereafter to remand the case for trial on its merits.

"As we consider this plea valid, we admit the special appeal, to try whether the judge's procedure is not incorrect."

JUDGMENT.

The plaintiffs in this case sued for possession of certain land, on the allegation that their uncle had purchased it in 1248, and had retained possession until his death in 1254, when the defendants forcibly dispossessed them. The defendants, denying this, declared that they had purchased the land in 1249, and had ever since been in uninterrupted possession. They, therefore, pleaded the statute of limitations.

The moonsiff goes fully into the merits of the plaintiffs' case, and, deciding that they had not established the validity of the documents they set up, or their possession within twelve years under these documents, dismissed the suit as barred by the statute of limitations.

The judge, going over the very same evidence as the moonsiff, comes to the conclusion that there is no reason whatever for

rejecting plaintiffs' evidence, and that, while that evidence proves the genuineness of the plaintiffs' documents, it equally establishes the spuriousness of those of the defendants: he therefore decrees the case in plaintiffs' favor.

It is evident, we think, that this is one of those cases in which the question of limitation is involved in the main issue of the validity of the plaintiffs' title. There was no occasion for the moon-siff to dismiss the case on the ground of limitation, which, under the circumstances, was an idle plea. He might have done so on the merits of the case, which he had fully investigated. A perusal of the moon-siff's decision satisfies us that the reason he assigns for his judgment are precisely those he must have given if the plea of limitation had never been raised.

The appellants' pleader has altogether failed to satisfy us that any point in the case remains uninvestigated, or that any object would be served by a remand.

We, therefore, affirm the judge's decision, and dismiss the appeal, with costs.

THE 11TH MAY 1859.

C. B. TREVOR, Esq., Judge, and E. A. SAMUELLS and G. LOCH, Esqs.,
Officiating Judges.

Case No. 730 of 1853.

Special Appeal from the decision of Mr. T. A. Glover, Officiating Judge of Rungpore, dated 15th March 1858, reversing a decree of Moulaee Itrut Hossein Khan, Principal Sudder Ameen of that district, dated 12th June 1857.

Pudabuttee Dassea and others, (Plaintiffs,) *Appellants,*
versus

Huromonee Dassea and others, (Defendants,) *Respondents.*

Baboo Unookoolchunder Mookerjee, for Appellants.

Baboo Taruknath Sein and Bungsheebuddun Mitter, for Respondents.

THIS case was admitted to special appeal on the 25th November 1858, under the following certificate recorded by Messrs. J. H. Patton and A. Sconce.

"Fukeerchand and Gunesham were brothers: and the present suit is brought by the widow of Fukeerchand and by the widow of his son, to recover a half share of certain jotes as their right, the jotes in question having been held jointly by Fukeerchand and Gunesham. Plaintiffs also set up a will, purporting to have been executed by Fukeerchand, and claimed on the strength thereof additional property.

A plaintiff claiming under a will, and not by virtue of inheritance, cannot be permitted to shift her ground, and ask a decree on the ground of right by inheritance.

"By the principal sudder ameen the will was thrown out, but judgment given for plaintiffs for a half share of the joint ancestral property; but the judge has dismissed the whole suit, on the ground that the plaintiffs had failed to show a good title to the lands, and that the onus to prove that the land was ancestral lay upon the plaintiffs.

"The ground of special appeal is, that the defendants admitted in their answer that the two brothers Fukeerchand and Gunesham originally held joint ancestral property, but asserted that they had entered into a separation of their joint property, and that the shares separately acquired by Fukeerchand had been washed away; accordingly, it is contended that, upon this statement, the onus of proving that the partition of land admitted to have been joint had been effected, lay with defendants. We admit the special appeal to try that point."

JUDGMENT.

On looking into the decision from which this special appeal is preferred, we observe that the judge finds as a fact that the share of Fukeerchand has been washed away by the river, and also that the will under which plaintiffs claim Gunesham's share is a forgery. The special appellants say that the judge has not found that partition has taken place, and, therefore, that they are entitled to have it enquired whether the property, which still exists, is not joint property, of which they ought to be put in possession of the half share which formerly belonged to Fukeerchand. The onus of proving that it was not joint property ought, they contend, to have been thrown on the defendants, who alleged the partition. We are of opinion that the judge's finding, as to Fukeerchand's share having been washed into the river, sufficiently evidences his opinion that a partition of his property had taken place. Besides which, as the plaintiffs claimed the property of Gunesham under a will, and not by virtue of inheritance, they cannot now be permitted to shift their ground. We dismiss the appeal, with costs.

THE 11TH MAY 1859.

C. B. TREVOR, ESQ., Judge, and E. A. SAMUELLS and G. LOCH, ESQS.,
Officiating Judges.

Case No. 779 of 1857.

*Regular Appeal from the decision of Baboo Kashishur Mitter,
Principal Sudder Ameen of Hooghly, dated 8th April 1857.*

Nubokishen Mookerjee, (Plaintiff,) Appellant,
versus

Kaleepersad Roy and others, (Defendants,) Respondents.

*Baboo Shumbhoonath Pundit and Mr. Longueville Clarke, for
Appellant.*

*Baboo Kishenkishore Ghose and Jugudanund Mookerjee, for
Kaleepersad Roy, Respondent.*

Suit laid at Rupees 14,956-1-6.

Messrs. C. B. Trevor and G. Loch.—Nubokishen Mookerjee, zemindar of 13a.-17g.-1c.-1k. in pergunnah Chunderkona, appertaining to lot Agur, plaintiff, sues Kaleepersad Roy, collusive putneedar, Joykisto Mookerjee and Rajkisto Mookerjee, of Oterparah, to obtain khas possession of 10a.-13g.-1c.-1k. share in Gopalsanee and seven villages appertaining to lot Agur, and 13a.-17g.-1c.-1k. share in Nachoolaree and five villages, by setting aside the collusive putnee settlement.

Plaintiff alleges that his father, the late Jugomohun Mookerjee, purchased the aforesaid lot at several auction sales, and had enjoyed possession of it; that, subsequently, on 18th Bhadro 1247 B. E., he will of their father, but that they acted in contravention of their duty as guardians, to the detriment of the plaintiff, and therefore the act so done fraudulently and collusively is liable to cancelment; that, consequently, the objection taken by defendant, respondent, that, as the plaintiff, neither with the plaintiff, nor subsequently, has produced the will, nor given good reasons for its non-production, nor proved the registered copy filed by him, his suit should be dismissed, falls to the ground. Moreover, as the party who first in the pleadings raised the question of power under the will of plaintiff's father, was the defendant Kaleepersad Roy himself, it was incumbent upon him, if upon any one, to have the original will produced.

Held, also, by the majority, that, even in a case founded on a will in which the evident contention is as to the terms of an admitted, and not the authenticity or genuineness of a propounded will, the application of the strict rules as to the admission of secondary evidence would be misplaced; and as both parties admit the will executed on a particular day, a registered copy of the same, if the original were in the possession of a third party, and not produced, would be quite sufficient, under the circumstances, for the purposes of the suit.

Held by the majority, that the fact of letting out the property of the minor ward in putnee is of itself an act at first sight so injurious to the party possessing the right of ownership, as, on a suit being instituted by that owner, after reaching his majority, calling that act in question, to throw the burden of supporting it at once on the guardians, or putneedar, or both.

Held by the majority that, though the defendant has failed to show that the grant of the putnee lease to him was warranted by the terms of Jugomohun's admitted will, still he has sufficiently shown that the transaction between him and the executors was not injurious to the plaintiff, or of a character to raise a suspicion of fraud and collusion.

Held by the whole Court, that the evidence of the confirmation by the plaintiff, after he had attained his majority, of the act of the executors, with reference to the putnee lease granted to defendant, is clear and conclusive.

Appeal dismissed, and the order of the lower court affirmed, with costs.

executed a will, which was duly registered, appointing the defendants Joykisto Mookerjee and Rajkisto Mookerjee as his guardians for supporting and educating him during the period of his minority; that he then farmed the said lot to Joykisto Mookerjee for the period of twelve years, deducting rs. 2500 as clear profits, and assigned the said lot, together with other properties, to plaintiff's share; and then, on 14th Assin of the aforesaid year, died; that, on the death of his father, the defendants, his guardians, instead of instituting a suit against Kaleepersad Roy, to set aside the putnee settlement of the 3a.-4g. share of the seven villages alleged to have been made with him on 3rd Poos 1250, concluded a collusive settlement with him of 10a.-13g.-1c.-1k. share of those villages, together with 13a.-17g.-1c.-1k. of Nachoolaree and four other villages, thereby causing great injury to plaintiff's estate; that, subsequently, on attaining his majority, he, plaintiff, frequently, though unsuccessfully, requested the ijara-dars and the defendant putneedar Kaleepersad to relinquish his putnee rights amicably; that, as there is no other means left for obtaining khas possession of the villages, he has instituted this suit to obtain khas possession of those villages, by setting aside the collusive putnee settlement, with mesne profits.

The defendant Kaleepersad's answer is to the effect, that the plaintiff's father, considering his death inevitable, had, with a view of guarding against future disputes, executed a will on 28th Bhadro 1247, defining the portion of property which he left to each of his sons; that, as the plaintiff and Bejoykisto Mookerjee were minors, he appointed the two defendants, Joykisto and Rajkisto Mookerjee, as guardians for protecting and settling the property of the minors: that, moreover, apprehending that disputes might in future arise regarding the adjustment of the income belonging to the estates of the minor, his father gave the lakhiraj lands and 13a.-17g.-1c.-1k. share of lot Agur, which fell to the plaintiff's share of the property, into the hands of the guardians, in the form of an ijara, though not strictly a farm, reserving rs. 2500 per annum, exclusive of all charges, as net profit for the minor's share. He acted in the same way regarding the property falling to Bejoykisto's share, extending the ijara up to fifteen years, his intention being that, in either case, the ijara might last until the minor sons attained their majority; that, according to this will, the defendants, executors, were perfectly authorised to make any settlement of the property of the minors that to them might be most advantageous; that the defendants, executors, under the power vested in them by the will executed by plaintiff's father, concluded a putnee settlement of the disputed property with him, after taking rs. 2106 as premium; and that, by this settlement, plaintiff is not a loser but a gainer; that plaintiff's father had purchased, at a private sale, 3a.-4g. share of mouzah Gopalsanee, with other villages

appertaining to lot Agur, from the party who had purchased them at a sale in execution ; that this share of the aforesaid mouzah had previously been given to him, defendant, in putnee, at a jumma of rs. 565-15-11 ; that the defendants, executors, had no power to set aside that putnee, but concluded a putnee settlement of the 10a.-13g.-1c.-1k. share of the aforesaid villages at a putnee rent of rs. 1922-0-3, for a consideration of rs. 1000 ; hence, in comparison with the former putnee settlement, the present settlement has given a profit of rs. 129-13-5, exclusive of the consideration money, which is clear gain ; moreover, the whole of the five villages, Nachoolaree, &c., were let out in putnee in the time of the former proprietor, at a jumma of sicca rs. 2502, or Ob's rs. 2665-11a.-17g. ; that the plaintiff is proprietor of 13a.-17g.-1c.-1k. in the five villages, the putnee settlement of which was made by the two guardians, defendants, with him at an annual jumma of Co's rs. 2338, and he has paid also rs. 1106 as consideration money ; hence, plaintiff has obtained a greater amount of jumma than in former settlement, and has received the consideration money also ; altogether the defendants had by the settlement with him acted to the advantage of the plaintiff ; that, moreover, after attaining his majority, the plaintiff has, both by amicable payment, and by suits under Regulation VII. of 1799 and Regulation VIII. of 1819, realised amounts from defendant under the putnee settlement, and has thus confirmed the acts of his guardians, and has, since attaining his majority, received from his brothers the amount of consideration paid to them by him ; that, lastly, this suit has been instituted through the malice of Joykisto and Rajkisto Mookerjee, defendants, with a view of injuring him, and, as founded upon no valid ground, should be dismissed.

The defendant executors, Joykisto Mookerjee and Rajkisto Mookerjee, did not enter an appearance.

The principal sudder ameen in his decision has declared the case to rest upon two issues, *first*, whether or not the putnee settlement of the disputed property effected by the Mookerjee defendants, in the capacity of guardians, with the Roy defendant is valid, and whether or not the plaintiff has sustained any loss or injury by that putnee settlement ; and, *second*, if such be the case, whether or not the plaintiff, on his attaining his majority, has affirmed the said putnee settlement.

On the first issue, the principal sudder ameen remarks that the plaintiff has alleged in his plaint, that his father had farmed out the disputed mehal to the Mookerjee defendants by a will, bearing date 28th Bhadro 1247, and that the executors, defendants, had in the exercise of their authority concluded a putnee settlement of the disputed mehal with the defendant Kaleepersad Roy, and had thereby caused a heavy loss to the putnee jumma ; but the plaintiff

has not filed the said will, which is the principal document of his claim, together with the plaint, neither has he assigned any reason for not doing so ; but he has filed a separate petition, stating that the document is in the hands of the two Mookerjee defendants. Subsequently to the Section X. proceeding, both parties have filed lists of witnesses, in which appear the names of the said two Mookerjees for producing the said will, and proving several other matters. Processes were served upon them ; but they have neither produced the will, nor appeared in court to give their evidence ; consequently orders were passed for the attachment of each of defendants' property to the extent of Co.'s rs. 500 ; still they did not file the will, nor give their depositions ; moreover, it appears that Kalachand Chuckerbuttee, the agent of Joykisto Mookerjee, is conducting this case on behalf of plaintiff, hence it is impossible that the defendants are ignorant of the order to produce this document ; but it is most probable that in the said will there is some paragraph which, if it were produced, would be injurious to the plaintiff's claim, otherwise plaintiff could have had no difficulty in obtaining it from his brother, or from some other court in which it may have been filed, and filing it in the present suit ; and not having so acted, and having filed merely a copy of the original document from the registry office, such evidence, under the precedents of this Court of *Rajah Byjnath Narain Singh * versus Mr. Fitzpatrick and Bhoodoo Beebee versus Gopal Dass Mohunt*, is inadmissible, and his suit liable to dismissal. But on perusing the said copy of the will, it appears that the said two defendants have not concluded the putnee settlement of the property in suit contrary to the terms of the will, for the will expressly authorises the defendants to keep the zemindarees in their possession for a certain time as under an ijara or farming lease, and empowers them to make such arrangements regarding this settlement as to them may seem most advantageous, and the plaintiff is restricted from calling in question any act done by the defendants, executors, under the authority conveyed in the will. Moreover, the plaintiff has adduced no proof to support his statement that the putnee settlements in question have caused him a great loss ; but rather from the evidence of the defendant, both documentary and oral, it appears that the settlements are profitable to the plaintiff.

On the second issue, as laid down by him, the principal sudder ameen was of opinion, from the several petitions of the plaintiff under Regulation VIII. of 1819, filed by him after he had attained his majority, praying for the sale of the putnee talook for the recovery of the arrears of rent of 1260, 1261, 1262, and 1263, that plaintiff had clearly admitted and acted upon the validity of the putnee lease ;

* Sudder Decisions of December 1852, pages 363, 364. Idem, pages 368—372.

that, consequently, in conformity with the precedents of this Court, dated 1st June 1853, in which Saadut Alee Khan was appellant, and of 13th March 1856, in which Ranee Doorgasoonderee was special appellant, the putnee lease cannot now be set aside. Moreover, as the plaintiff, in his petition under Regulation VIII. of 1819, bearing date 2nd Bysakh 1250, alleges that the executors, defendants, held possession of the zemindaree, and acted regarding the property as guardians, the plea now raised by the plaintiff, that they acted and had power to act only as farmers in zemindaree matters, falls to the ground. For the above reasons the principal sudder ameen dismissed the plaintiff's suit, with costs.

JUDGMENT.

From the decision of the lower court adverse to him, an appeal has now been preferred to this Court by the plaintiff below ; and he brings forward in his grounds of appeal all the points urged by him in the court below.

The main facts of the case out of which the present suit has arisen, and regarding which there is no dispute, are as follows. Jugomohun Mookerjee, the father of the plaintiff, on 28th Bhadro 1247, in revocation of a previous will, dated 13th Jeyt 1239 B. S., executed a will, by which he divided his property amongst his four sons, and appointed the two elder, Joykisto and Rajkisto Mookerjee, as guardians of his two minor sons. With a view also of obviating the possibility of disputes, on their attaining their majority, regarding the management of the estates, the testator gave those which fell to the share of the elder minor, Nubokisto Mookerjee, the plaintiff in this suit, in farm, as it were, to the guardians for twelve years, that is, until he would reach his majority, reserving the sum of rs. 2500 as profits to be carried yearly to the credit of the minor : and those which fell to the minor Bejoykisto Mookerjee, he, on the same terms, gave to them in farm for fifteen years, when the minor would reach his majority ; subsequently, that is, after the death of Jugomohun Mookerjee, the defendants, executors under the will and guardians of the minors, gave certain villages, which fell to the share of the plaintiff in the suit, Nobokisto Mookerjee, in putnee to the defendant, Kaleepersad Roy. He has now reached his majority, and he now sues to have the settlement set aside, which he alleges to have been collusively made by the executors as his guardians with the Roy defendant, to his detriment ; whereas by the Roy defendant it is pleaded, that settlement was made with him under the power vested in the executors under the will, and was in no way to the detriment, but to the advantage of the plaintiff, and has been confirmed by him since reaching his majority.

It is contended by the counsel and pleaders on the part of the plaintiff, appellant, that the present suit is one regarding the proper construction to be put upon a will ; that in construing it the terms of the will are to be taken in their ordinary meaning, and that meaning is, under no circumstances, to be enlarged, unless the benefit of the parties demands it, or the evident intention of the testator requires such construction ; that, in the present case, certain powers were given to the executors, which, under no circumstances, could they exceed ; that, doubtless, generally guardians have the power of making any arrangement that they may consider best for the interests of the minor wards, and if they act in a *bona fide* manner, such act will, as was ruled by the Court in the case of Doorgasoonderee, * stand good until the minor shows that they are clearly to his detriment. But in the present instance their powers were curtailed ; they were limited, by the terms of the will, to the exercise of all the powers as to the zemindaree which a farmer might exercise, and they were bound to deliver the estate to the minor on his coming of age, unencumbered ; that, consequently, the incumbrance in the shape of the putnee talook of the defendant should be removed and cancelled as unauthorised and injurious to the minor ; that the mere receipt of rent subsequent to the minor's reaching his majority does not amount to an acquiescence in the tenure, but only to the possession of the tenant for the period which the rent covers ; that the proceedings under Regulation VII. of 1799 and VIII. of 1819, though somewhat stronger in the matter of the recognition of the tenure, do not amount to such a recognition as to bar the plaintiff's right to sue for re-entry on the property ; that the receipt given by the minor, shortly after his reaching his majority, to the executors, as a full acquittance and acknowledgment of every thing that had been done by them, cannot, considering the time at which it was given and the relative position of the parties, be considered as absolutely binding on the minor ; that, consequently, the Court, looking to all the circumstances of the present case, should relieve the property of the minor from the incumbrances which, both in excess of their power under the will and of their duty as guardians, the defendants Joykisto and Rajkisto Mookerjee, have imposed upon it, and give plaintiff possession of it, with mesne profits.

On the part of the (defendant) respondent Kaleepersad Roy, it is urged, that the present suit is founded upon the will of the plaintiff's father ; that that has not been produced and filed with the plaint as required by law, and no good and sufficient cause has been shown for its non-production, either then or afterwards ; that, consequently,

* Sudder Decisions of December 1856, page 170.

no sufficient ground for the admission of secondary evidence at all has been shown ; at all events, a mere registered copy of the will, unproved, is under any circumstances inadmissible, and plaintiff's suit should be at once dismissed ; that, looking to the merits, the plaintiff has no case at all ; that the putnee talook was granted to the defendant by Joykisto and Rajkisto Mookerjee under the powers conveyed to them by the will of their father ; that this power in no way curtails the general power of guardians, but expressly authorises them to let and settle the estate in any manner that they may think fit ; that, acting on this power, and as a portion of one of the properties in suit was let out in putnee before it had been purchased by Jugomohun Mookerjee, his sons, the executors, let the Roy defendant in putnee the remaining right which had been purchased by their father, and, looking both to the consideration money paid and the rents derivable from the property, they acted to the minor's benefit ; that, moreover, by the receipt of rents and by the institution of suits under Regulation VII. of 1799, and Regulation VIII. of 1819, brought subsequently to his attaining his majority, the plaintiff has recognised his tenure and his possession under it ; that he has also, subsequently to that date, given to the executors an acquittance, in which he admits having received from them the consideration money paid on account of the putnee property in suit, and also confirms the tenures themselves ; that such being the case, even supposing the executors had acted beyond the powers vested in them by the will, plaintiff is in no position now to question the act done by them, and, consequently, his present appeal should be dismissed, and the order of the lower court affirmed.

Before proceeding to the consideration of the merits of the case, it will be well to consider the plea raised by the defendant, to the effect that, as plaintiff's case is founded on the will, and as he, neither with the plaint nor subsequently, has produced this will, nor given good reasons for its non-production, nor proved the registered copy filed by him, his appeal should be dismissed.

The plaintiff, in his reasons of appeal, and the principal sudder ameen also, in the course of his decision, remark, that the suit is founded upon the will executed by Jugomohun Mookerjee. On reverting, however, to the plaint itself, we find that such is not the case ; but that, though in that pleading a recital is made, to the effect that plaintiff's father made a will and appointed the defendants, Joykisto and Rajkisto Mookerjee, guardians of his minor sons, giving them a farm of the property allotted to the minors during their minority, reserving a specified yearly benefit to the minors, still the burden of the plaint is not that they acted beyond the power given to them by the will, but that they acted, in granting the putnee talook to the Roy defendant, in contravention of their duty as

guardians to the detriment of the plaintiff, and, therefore, the act so done fraudulently and collusively is liable to cancellation.

The Roy defendant then pleads in his answer that, in granting the putnee tenure, the executors acted in strict accordance with the powers given to them in the will executed by Jugomohun Mookerjee; and this fact was denied by plaintiff in the replication. This, however, is very different from the suit being based upon the will; and it is clear that the party who first explicitly raised the question of power under the will was the defendant, respondent, and it was incumbent upon him, if upon any one, to have the will produced. With this object the defendant caused a subpoena *duces tecum* to be issued on the defendants, executors, but it could not be served; and the plaintiff, it would seem, with no better effect, took the same step. Subsequently, when the case was up for hearing, the plaintiff filed a registered copy of the will; and as the question, as raised by the defendant, was upon the interpretation of an admitted will, and not the genuineness of any particular will, the copy was accepted and commented on by the principal sudder ameen without objection from either party.

Now there can be no doubt, as frequently laid down by this Court, that when a party sues upon a document, if it be in his power, it is incumbent upon him to produce the same, either with the plaint or subsequently; that secondary evidence of a document is inadmissible, until it be shown that the production of primary evidence is out of the party's power; and that, if such document be in the possession of an adverse party, it must be shown that notice to produce the original has been served or attempted to be served upon him, ere secondary evidence can be admitted. As, however, the present suit is, in our opinion, not based upon the will at all, these undoubted doctrines of the law of evidence do not apply to the present case; and the objection taken by the defendant, respondent, in appeal, on the ground of the non-production of the original will, and on the admittance of an unproved copy without good ground shown for the non-production of the original, falls. Moreover, we think that, even in a case founded on a will, in which the evident contention is as to the interpretation of the terms of an admitted, and not the genuineness or authenticity of a propounded will, the application of the strict rules as to the admission of secondary evidence would be misplaced; and as both parties admit the will executed on a particular day, the registered copy of the same, if the original were in the possession of a third party and not produced, would be quite sufficient, under the circumstances, for the purpose of the suit. We may here observe that Section XVII. Act X. of 1855 applies only to documents referred to in the pleadings in the possession or power of the party

pleading them. The will was evidently not in the plaintiff's possession or power, so, even if the suit had been founded on the will, that section of the law could not have been made applicable to it. In our view of the case, also, the points raised in the precedents of this Court, cited by the principal sudder ameen, do not arise in it.

Looking then at the case, as we are bound to do, as it was originally brought, we are of opinion, that the fact of a guardian's letting out the property of his minor ward in putnee is of itself an act at first sight so injurious to the party possessing the right of ownership, as, on a suit being instituted by that owner after reaching his majority, calling that act in question, to throw the burden of supporting it at once on the guardian, or the putneedar, or both.

Now, in the present case, the putneedar in support of the putnee lease pleads, *first*, that the executors, defendants, granted it to him in the strict exercise of the powers vested in them under their father's will; *second*, that, having done so, it was not only not injurious but profitable to the minor; *third*, that the lease had been confirmed by the minor on reaching his majority, by the receipt of rents paid to him, and by suits instituted by him, under Regulation VII. of 1799 and Regulation VIII. of 1819; and, *fourth*, by the acknowledgment and acquittance executed by him to his brothers, the executors, shortly after reaching his majority.

On perusing the will of Jugomohun Mookerjee, we find that, after dividing his property amongst his four sons, the testator wills that, on his demise, his sons shall obtain possession of the estates according to the division therein effected. Owing, however, to the length of time that will elapse before his minor sons, Nobokisto Mookerjee and Beejoykisto Mookerjee, will reach their majority, the zemindarees and other estates falling to their shares are to be held by Joykisto and Rajkisto Mookerjee as farmers, that is to say, the estates of the share of the minor, Nobokisto Mookerjee, yielding an annual profit of rs. 2500 over and above the revenue payable to Government, are to remain for twelve years, and the estates of the share of the minor, Beejoykisto Mookerjee, yielding the same annual profits, are to continue for fifteen years, from the testator's death, in their possession, who are authorised to *let and settle the same*, and conduct suits in court as the attorneys of the minor, discharging the Government revenue and paying all expenses. The minors are to have nothing to do with the expenses; but they are each to receive annually the reserved rent, *viz.* rs. 2500, out of which rs. 500 are to be spent in their maintenance, education, marriage, &c., which is to be received by them in monthly payments, and the remaining rs. 2000 is to be invested by the farmers in the purchase of Government securities to be kept with them. On the expiration of the term of the ijara, the ijaradars are to make over to Nobokisto Mookerjee and Beejoykisto Mookerjee the

zemindarees farmed, and also the Government securities purchased out of the profits thereof, together with interest on the same.

Looking to these terms, we are unable to find in them any authority for the granting of a putnee lease of the property farmed to the executors, defendants. The words *let and settle* are certainly large ; but they must, we think, be considered in connection with the interest which the executors had in the minors' estates. That interest was confined to farming leases for periods of twelve and fifteen years ; the exercise of the powers to let and make settlements of the property must, therefore, it appears to us, be limited by those terms, and will not include the granting of perpetual leases, and we think that the intention of the testator was that, on reaching their majority, his minor sons should receive their estates from the farmers free and unencumbered.

Though the words of the will do not warrant the granting of the putnee lease, still we do not think, looking to the amount of premium paid to the executors for the leases, *viz.* rs. 2106, and to the rent fixed on the same by comparison with that fixed upon another portion of one of the estates, and to other papers filed, that, in acting as the executors did, they acted otherwise than in strict good faith to the minor ; and we are unable to perceive that any actual injury, beyond that, which is not inconsiderable, of divesting the minor of the actual possession of his estates, occurred to him by the acts of the executors. But it is unnecessary to pursue this point further, for our judgment turns not on it, but on acts of recognition and confirmation done by the plaintiff after he reached his majority.

The first class of acts presented to us in evidence, as showing that the plaintiff confirmed the lease after he reached his majority, consists of the receipt, by him, of the putnee rents. That the plaintiff, subsequent to reaching his majority in 1259, did receive the rents of the putnee lease, is undoubted ; but we think, that the simple receipt of rents from a party in possession, unaccompanied by any act on the part of the recipient recognising the tenant's lease, but accepting these merely as compensation for the use of the land, does not amount to a waiver of objection to, or recognition of, the rights claimed by the tenant ; and, therefore, such acts alone do not prevent the landlord from bringing a suit for entry if he be so minded, or act as an estoppel after an action has been so brought.

The second class of acts placed before us, as evidencing the confirmation of the lease by the plaintiff, after reaching his majority, consists in suits instituted by him under Regulation VII. of 1799, and petitions for sale of the putnee lease presented under Act VIII. of 1819. In these cases the plaintiff was not a passive recipient, but an active pursuer. In his plaints and petitions, the relation of landlord and tenant, and also the particular terms under which

that relation exists, are distinctly set forth. Now, we think that, when, subsequent to a supposed forfeiture incurred by breach of a contract on the part of a lessee, or subsequent to the occurring of a right of re-entry to the landlord, he has conducted himself so as to have bound himself conclusively as treating the relation of landlord and tenant, under the original lease, as still existing between him and lessee, he must be considered to have waived those rights and to have confirmed the original lease. Applying this rule to the circumstances of the present case, we are of opinion that, as the plaintiff, subsequent to attaining his majority, at which time his alleged right of re-entry occurred, acknowledged clearly and conclusively, by suits in court, the existence of the relation between him and the defendant under the putnee lease, he has waived his alleged right of re-entry, and by his acts has confirmed the original relation between them of zemindar and putneedar.

But the evidence of confirmation by the plaintiff of the defendant's right does not stop here. The defendant has filed before this Court a registered deed of receipt and acquittance executed by plaintiff, in favor of his executors, under his father's will, dated 19th Bysakh 1260, the year following that on which he reached his majority. In this deed he confirms all the acts done by the executors relative to his estates during his minority, and acknowledges the receipt of the premium paid on account of the putnee talook now in dispute. The genuineness of this document, the pleader on the part of the plaintiff has not ventured to question; but he has urged that, looking to the relative positions, the relative ages, and worldly experience of the parties to that deed, the Court should not bind the minor to it, but should take into consideration the possible circumstances under which such a deed may have been extorted from him.

Undoubtedly, when properly, openly, and fairly questioned, the Court will not conclusively bind a party to such a deed executed by him in favor of his guardians and the executors of his father's will, shortly after his attaining his majority; but, in order to enable the Court to set aside what *prima facie* is his own deliberate act, the Court requires the circumstances, either of fraud, duress, undue influence or mistake, as may be, affording the legal ground for setting it aside, to be distinctly stated, and proved before it; and, in the absence of any proof of the nature, the party must be bound by his own act. In the present case the document has not been alluded to by the plaintiff, and we therefore consider that the plaintiff is conclusively bound by it. From it we clearly learn that the plaintiff has, to the grantors of the putnee lease to the defendant Kaleepersad, done what, by his suit in court, he has done as regards the grantee, *viz.* he has confirmed the tenures, and that not only in words but by an acknowledgment of the premium paid for them.

This document, however, whilst it, together with other evidences, demolishes the plaintiff's case, at the same time evidences the bad faith of the defendants, Joykisto and Rajkisto Mookerjee, towards the defendant Kaleepersad Roy. They granted the putnee lease to him; they received the consideration for it and paid the same to the plaintiff; they now, cognizant of this document, allow the present suit to be instituted; though made defendants, they do not appear; though summoned and directed to bring their father's will with them, they do not attend, but allow the case to proceed, when the means of clearing up the whole matter is in their possession. Such conduct shows evident collusion with the plaintiff in this suit and bad faith towards the defendant, Kaleepersad Roy; and in showing that, it displays a line of conduct on the part of Joykisto Mookerjee and Rajkisto Mookerjee highly unbecoming their station in society.

As then, we think for the reasons above given, that the Roy defendant has clearly shown that the plaintiff has, by his acts done since he has attained his majority, confirmed the putnee lease granted, whether with or without authority, to him, by the executors and guardians of the plaintiff, under his father's will, we dismiss the appeal, and affirm the order of the lower court, with costs.

Mr. E. A. Samuells.—I object to give any opinion upon the construction of this will, because the original has never been produced, and the copy which was filed in the court below, after the pleadings had been closed, has not been proved to be a true copy, and is not admitted by respondent's pleader.

I observe, moreover, that the plaintiff has not brought this suit on the ground that the executors had no power under the will to grant the putnee lease, but on the allegation that they had colluded with the substantial defendant, and that the settlement they had effected with him was so injurious to his (the plaintiff's) interest, that it ought to be set aside.

The facts which have been laid before us entirely negative the supposition of any collusion between the executors and the defendant, while the proof of plaintiff's confirmation of the executor's acts, after he attained his majority, is clear and conclusive.

I, therefore, concur with my colleagues, in affirming the order of the court below, and dismiss the appeal, with costs.

THE 12TH MAY 1859.

C. B. TREVOR, Esq., Judge, and E. A. SAMUELLS and G. LOCH, Esqs.,
Officiating Judges.

Case No. 687 of 1858.

*Special Appeal from the decision of Mr. O. W. Malet, Judge of
Beerbhoom, dated 29th March 1858, reversing a decree of
Baboo Baneemadhub Shome, Sudder Ameen of that district,
dated 4th June 1857.*

Ajeeba Beebee and others, (Defendants,) *Appellants,*
versus

Juggessur Bhattacharj, (Plaintiff) *Respondent.*

Moulvee Mahomed Ismail and Moonshee Ameer Alee, for Appel-
lants.

Baboos Kishenkishore Ghose and Obhoychurn Bose, for Respond-
ent.

THIS case was admitted to special appeal on the 17th November 1858, under the following certificate recorded by Messrs. J. H. Patton and A. Sconce.

"This suit was instituted to recover the balance of a debt due on a *kistbundee*, together with interest. The first court dismissed the claim; but as the judge has decided for plaintiff, defendants (the petitioners) show three grounds of special appeal.

"First, it is said, that the substantive debtor is admitted by plaintiff to be Ajeeba Beebee alone, and, accepting the *kistbundee* filed by plaintiff to be established, the fact that the name of Ajeeba Beebee was signed on her behalf by her son Gholam Kullumdee, does not entitle the plaintiff to a judgment against him.

"The zillah judge, we observe, assigns no special reasons for holding Gholam Kullumdee to be answerable for the debt as well as his mother; and, entertaining doubts as to his legal liability, we admit the special appeal, to try whether the judge's decision should not be amended on that point.

"Another point taken by petitioners is, that the judge was not competent, without special cause, to take evidence for the plaintiff which had not been filed before the first court; and, a third, that the judge has not considered whether the son Gholam Kullumdee was empowered to sign the *kistbundee* on the part of his mother. But, as it appears to us, that the judge was legally competent to take fresh evidence at his discretion, and, as he appears, from all the circumstances of the case, to have considered that the son acted with the knowledge of his mother, we see no grounds to refer these points in special appeal."

Held, that as the son signed the *kistbundee* in the present case, as the agent of a disclosed principal, his mother, it was competent to the plaintiff to sue the principal alone, but not the principal and agent together.

So much of the judge's decision as makes the son liable on the *kistbundee*, reversed, and special appeal decreed, with costs.

JUDGMENT.

This special appeal has been admitted to try whether, as the plaintiff admits that his substantive debtor was Ajeeba Beebee, and as the judge finds that the *kistbundee* on which the suit was based was executed by her son, necessarily, on the plaintiff's admission, on her behalf, the son was legally liable with his mother for the debt or not.

We think that the son must be considered, in the matter of the signature on the *kistbundee*, as an agent acting with authority for a disclosed principal, his mother; that, consequently, it was competent for the plaintiff to sue the principal alone, but not the principal and the agent together. We, therefore, reverse so much of the judge's decision as makes Gholam Kullumdee liable for the sum due on the *kistbundee* executed by him as agent for his mother, and decree the special appeal, with costs.

THE 12TH MAY 1859.

C. B. TREVOR, Esq., Judge, and E. A. SAMUELLS and G. LOCH, Esqs.,
Officiating Judges.

Case No. 667 of 1858.

Special Appeal from the decision of Mr. R. Abercrombie, Judge of Dacca, dated 2nd March 1858, affirming a decree of Moul-vee Mahomed Nazim Khan, Principal Sudder Ameen of that district, dated 7th April 1857.

Gogunchunder Sein and others, (Plaintiffs,) *Appellants,*
versus

Joydoorga *alias* Golukbasse and others, (Defendants,) *Respondents.*

Baboos Shumbhoonath Pundit, Unookoolchunder Mookerjee, and Kishensukha Mookerjee, for Appellants.

Baboos Ramapersad Roy and Gopal Lal Mitter, for Joydoorga, Respondent.

Held, that THIS case was admitted to special appeal on the 10th November none but the immediate reversioner is entitled to sue to interfere with the acts of a Hindoo widow in possession. 1858, under the following certificate recorded by Messrs. J. H. Patton and A. Sconce.

"Petitioners are plaintiffs in this suit. They are the sons of Kirteechunder, who was the adopted son of one Kaleekapersad; while the principal defendant, Joydoorga, is the widow of Obhoylochun,

Held also, that a petition presented by the immediate reversioner, when the suit was pending in special appeal, waiving his rights in favor of the plaintiffs, in order to cure the defect of parties, could not be admitted at that stage.

the adopted son of Jugutchunder, who was the son of Prankishore, a brother of Kaleekapersad.

"Petitioners raise this action against Joydoorga, a childless widow, in order to declare that she is not competent to adopt a son to set aside certain alienation of her deceased husband's property, which she has effected, and to acquire possession of the estate which came to her from her deceased husband. Plaintiffs also appear to have added in the plaint that Joydoorga was entitled to maintenance only.

"Both the lower courts have thrown out the suit, on the ground that, as Kirtteechunder, the plaintiffs' father, is alive, the plaintiffs are not competent, during his life, to prefer this claim; and the ground of special appeal is that, plaintiffs being reversionary heirs, on the failure of their father to take steps to protect their eventual interests, they were legally entitled to challenge the legality of the acts of Joydoorga, which tend materially to operate to their prejudice. It is not clear that, in the plaint, the reversionary rights of plaintiffs were relied upon. No reason appears to have been assigned for the silence of Kirtteechunder, or for the suit being preferred by plaintiffs, except in their own right. But, upon the whole, we admit the special appeal, to try the grounds of the decision passed in the zillah."

JUDGMENT.

The counsel for the special appellant has been unable to show us that, under any precedent of this Court, the more distant reversioners have, during the life-time of the immediate reversioners, a right to sue to set aside acts done by the widow; but they contend that this defect has been remedied, as the father of the appellants, who is the immediate reversioner, has filed a petition in this Court, waiving his claim to the property, and a decision of this Court, dated 18th February 1851, Pertabchunder Dutt, appellant, is quoted to show that such an application may be received even at this stage of the proceedings. We concur with the lower courts in holding, that the suit, in its present form, cannot lie. We think that the immediate reversioner can alone bring an action to interfere with the acts of a widow in possession, and that the plaintiffs are reversioners in too remote a degree to entitle them to sue to set aside acts done by the widow, or to interfere with her management; and we consider that the defect of parties, which is apparent in the present suit, cannot now be remedied, and the decision quoted by the counsel is directly opposed to the admission of a petition such as is now sought to be filed. We reject the appeal, with costs.

THE 12TH MAY 1859.

C. B. TREVOR, Esq., Judge, and E. A. SAMUELLS and G. LOCH, Esqs.,
Officiating Judges.

Case No. 772 of 1858.

*Special Appeal from the decision of Mr. E. Latour, Judge of
the 24-Pergunnahs, dated 17th May 1858, reversing a decree
of Mr. J. S. Bell, Officiating Additional Principal Sudder
Ameen of that district, dated 26th June 1857.*

Shumbhoochunder Ghose, (Defendant,) *Appellant,*
versus

Moheshchunder Mitter, (Plaintiff,) *Respondent.*

Baboo Dwarkanath Mitter, for Appellant.

Baboo Sreenath Dass, for Respondent.

Held, that the present action, which is one simply for the attachment of surplus proceeds, to which the plaintiff considers he has an inchoate right, and which he alleges he is apprehensive the mortgagor may appropriate ere he is able to bring his action, for possession of the property mortgaged to him, and for the money in deposit as representing that portion of the property sold for an arrear of rent, is altogether inadmissible in our courts.

Held that, as the mortgagee's second suit for possession of the mortgaged property, and the surplus proceeds as representing land, is pending, he can, if he thinks fit, and if he has reasonable apprehension that the mortgagor intends to remove the surplus proceeds, move the court under Section V. Regulation II. of 1808, for the attachment of the same.

The special appeal decreed, with costs.

THIS case was admitted to special appeal on the 18th December 1858, under the following certificate recorded by Messrs. H. T. Raikes and D. I. Money.

"Petitioner, as proprietor of certain lands, mortgaged them to the plaintiff in this action, who, in due course, issued notice of foreclosure; but before the expiry of the year of grace a portion of the lands was sold in execution of a decree against the petitioner, who, after satisfying the creditor from the sale proceeds, had remaining to him the balance of the price in deposit.

"The plaintiff in this action then instituted this suit, claiming to have the remaining balance held at his disposal as the equivalent of the lands sold while under mortgage to him; and the judge, on the reasoning that this money, being the price of the lands, now represents those lands and is subject to the lien of the mortgage, decreed the claim of the plaintiff.

"Petitioner appeals, on the ground that the lands sold in execution must be considered as still burthened by the mortgage he created on them, and that his reserved right, namely, the right of redemption, has been sold alone; consequently, the mortgagee can have no right of action against him for sale proceeds, or claim a right to interfere with his power to deal with the price in any respect.

"We admit the special appeal to try the legality of the judge's decision."

JUDGMENT.

The petitioner Shumbhoochunder Ghose mortgaged certain property, consisting of an under-tenure in the Soonderbuns, to

is pending, he can, if he thinks fit, and if he has reasonable apprehension that the mortgagor intends to remove the surplus proceeds, move the court under Section V. Regulation II. of 1808, for the attachment of the same.

Moheshchunder Mitter. The sum lent not having been repaid, notice of foreclosure under Regulation XVII. of 1806 was served on the mortgagor. Previously to the expiry of the year of grace a portion of the mortgaged property was brought to sale, in execution of a decree for rent obtained by the lessee of Government against him. The decree having been satisfied, the mortgagee now brings the present suit, simply for the attachment of the surplus proceeds, arising from the sale of property mortgaged to him, remaining in deposit. It appears that, after the year of grace had expired, and his mortgage became foreclosed, the mortgagee instituted another action for possession of so much of the land mortgaged to him as has not been sold in execution, and also for the amount of surplus proceeds, the attachment of which he has sued for, and obtained by the order of the judge in this case.

We think that the present action, one simply for the attachment of surplus proceeds, to which the plaintiff considers he has an inchoate claim, with a view to ulterior proceedings in a subsequent suit, in which his right to them must be determined, is from its nature quite inadmissible. The plaintiff alleges that he brings it, being apprehensive that the mortgagor may appropriate it ere he is able to bring his action for possession of the property mortgaged to him, and for the money as representing that portion of the property sold for an arrear of rent. Such an apprehension, irrespective of the nature of the suit, is not a sufficient ground for a civil action ; and for this reason alone the decision of the judge must be reversed, and the special appeal decreed, with costs. As the mortgagee's suit for possession of the mortgaged property and the surplus proceeds as representing land is pending, if he thinks fit and if he has reasonable apprehension the plaintiff intends to remove the surplus proceeds, it is competent to him to move the court under Section V. Regulation II. of 1806. Under the view which we have expressed above, it is unnecessary to give an opinion upon the point on which the special appeal has been admitted. It arises in the suit of the mortgagee now pending in the court below, and may therefore come before the Court in special appeal hereafter.

THE 12TH MAY 1859.

C. B. TREVOR, ESQ., Judge, and E. A. SAMUELLS and G. LOCH, ESQS.,
Officiating Judges.

Case No. 739 of 1858.

Special Appeal from the decision of Mr. E. Latour, Judge of the 24-Pergunnahs, dated 14th May 1858, reversing a decree of Baboo Mohunlall Panday, Moonsiff of Kuddumgachee, dated 27th March 1857.

Deenonath Roy, after him his wife Beendoobaseenee Dassee, mother and guardian of Hurreemohun Roy and another, minors, (Plaintiff,) *Appellant*,

versus

Gopal Mundul, (Defendant,) *Respondent*.

Baboo Unnodapersad Banerjee and Baneemadhub Banerjee, for Appellant.

Baboo Kishensukha Mookerjee and Moonshee Ameer Alee, for Gopal Mundul, Respondent.

The special appeal was admitted, to determine whether the defendant was not bound by an admission made by him, in another case, as regards his jumma; but as the special appellant was unable to show that the respondent had made a distinct admission that his jumma was rs. 110, and the judge had found that the kuboolyut on which the suit was brought, and the accounts filed in support of it, were spurious, and that the pottah held by the defendant was valid, the appeal was dismissed.

THIS case was admitted to special appeal on the 3rd December 1858, under the following certificate recorded by Messrs. J. H. Patton and A. Sconce.

"This suit was brought by petitioner to recover arrears of rent due from the defendant, at the rate of rs. 110-8 per annum, under a kuboolyut, dated 8th Kartikh 1256. The first court gave judgment for plaintiff, but, on appeal by the tenant defendant, the zillah judge, for the reasons assigned in the decision hereto annexed,* has thrown out the suit.

"The defendant denied the execution of the kuboolyut relied upon by plaintiff, and set up eight distinct leases, of which the aggregate jumma was sicca rs. 87, or Company's rs. 93-0-8, and

* In this case the plaintiff sued to recover rs. 244-12a-19g-2c. as rents due upon 131 beegahs 18½ cottahs, for the years 1259 to 1262 B. S., as per a kuboolyut dated 8th Kartikh 1256, at a jumma of rs. 110-8.

The material defence to this action was, that he held the lands in question at a fixed rate under seven distinct pottahs, which are filed, and the corresponding vouchers for payment of the rents.

The case between the parties is contingent upon the genuineness of the instruments declared and pleaded.

The lower court finds that the kuboolyut is established, and the jumma-wasil-bakee papers support the claim; that the instalment bond, under which an attachment took place, shows the rate to be rs. 110.

The defendant appeals against this order, and maintains that his true jumma is rs. 87-4a-9g. He puts in the pottahs in the lower court, and maintains that the kuboolyut is false; that he is a ryot, and that his kuboolyut would have been on plain paper; the jumma wasil-bakee papers being also fabricated, and the kistbundee, which he admits, he says was written by the naib, and this jumma of rs. 110 was included in it collusively by the writer, owing to an ill-feeling, in consequence of the defendant's having complained in the foudaree court, in which the gomashta was punished.

The moonsiff rejects the pottahs put in by the appellant as fabrications.

with respect to these deeds, the judge's remarks are: 'The kuboolyut is incompatible with the appellant's pottahs, which I see no reason for discrediting, supported as they are by the numerous exhibits in support of their authenticity.'

"Now the pottahs produced by defendant, seven in number, run from the year 1229 to 1247; besides which, in the year 1248, defendant shows the rent due by him for an additional portion of land was fixed by decree. Thus the defendant's title-deeds do not come later than 1248, while the kuboolyut produced by plaintiff was of the year 1256; and the plaintiff in his replication also set forth a kistbundee, executed by defendant on 16th Cheyt 1259, in a moonsiff's court, in favor of a judgment creditor, named Kasheenath Bose, in which the jumma now sued upon was recorded on the same footing as is recited in the plaint, and was secured to Kasheenath Bose for the liquidation of the tenant's debt.

They are as follows:—

	Ra.	As.	Ga.	Cs.
1. 1229, 12th Bysakh	15	6	12	3
2. 1240, 5th Cheyt	44	4	16	12
3. 1241, 16th Assin	2	2	0	0
4. 1244, 9th Pooa	13	3	0	0
5. 1246, 8th Assin	1	12	0	0 (purchased, transfer not registered.)
6. 1246, 8th Assin	1	4	0	0
7. 1247, 27th Bysakh	1	2	0	0
8. 1248, 13th Joistasperdecree	6	8	0	0

Total 87 sicca, or Co.'s rs. 93-0-8.

The kuboolyut merely recites in general terms that, on measurement, 131 beegahs 18 cottahs 8 chittacks are in the defendant's possession at 15 annas the beegah—rs. 123-2a.-7g.-2c., less rs. 13-2a.-17g.-2c. on account of waste land, leaving rs. 110-8a. This is dated 8th Kartikh 1256 B. S.

There is no specification of the holdings of this defendant. The kuboolyut is engrossed on stamp paper, and it is not registered. Looking at the jumma-wasil-bakees, they appear to me to be wholly unworthy of any degree of credit; the paper is manifestly new, they bear the signature of a mohurrir, they purport to be for nine years. I place no credit on them.

The appellant puts in, to support his pottahs, all the different payments he has made, as evidenced by the receipts in exhibit. These are very numerous; and it is exceedingly improbable that the defendant would manufacture seven pottahs, when one would do; but other land is held under other titles, one lot he has purchased, and cannot get the zemindar to register his purchase. Then, too, all these numerous documents, showing the payments made to the credit of the different holdings. I consider the jumma-wasil-bakee papers undoubtedly spurious. The kuboolyut is incompatible with the appellant's pottahs, which I see no reason for discrediting, supported as they are by the numerous exhibits in support of the authenticity. In these cases, it is not the ryot ordinarily that resorts to forgeries.

With reference to the jumma-wasil-bakee papers, which I cannot give any credit to, and the exhibits filed in plea, I do not think that this judgment should stand.

I am unable to state how the jumma of rs. 110 found its way into the instalment bond of the appellant's creditor, Kasheenath Bose, whether it was written as stated by the naib of the zemindar as a step to this action. This may be so, as he, Kasheenath, was summoned to give evidence by the plaintiff, and produced it by petition. How he should have known about it otherwise, is not clear.

I am of opinion that judgment should be entered for the appellant, and, accordingly, I decree the appeal, with costs.

"Under these circumstances, the ground of special appeal brought before us by petitioner is that, since the defendant, by deed, executed by himself, and delivered into the civil court, declared his jumma, consisting of 131-18½ beegahs, to be assessed at rs. 110-8, and in his rejoinder to the plaintiff's replication in this suit did not deny the execution of the kistbundee, he is estopped from repudiating the statement in the kuboolyut which that kistbundee embodied.

"The question thus raised appears to us to be of considerable difficulty. We cannot, in special appeal, re-try the judge's inference from the evidence; but the point proposed by petitioner does not involve a reconsideration of the evidence, but rather the legal effect of certain acts done by defendant upon his position in this suit. The kistbundee referred to recites two under-tenures; one of mal land, consisting of 131-18½ beegahs, and assessed at rs. 110-8, and the second of resumed land, assessed at rs. 6-1-6, or in all rs. 116-9-6; and plaintiff, as already said, in his replication adduced this kistbundee as corroborative of the kuboolyut; and defendant in his rejoinder met this, not with any denial, but, in fact, with a recognition of the kistbundee, for it was observed, as we understand, that though his rent for all the land held by him had been raised by plaintiff to rs. 116, this admission did not affect the present case. Virtually defendant accepts the assessment of 131-18½ beegahs at rs. 110-8, as represented in the kistbundee; such also is the statement upon which the present suit is brought: and it appears to be a proper subject for consideration, whether defendant, by the admission made in his own pleading, is not bound by the statement relied upon by plaintiff, or otherwise it is not obligatory on defendant to prove that the rent of rs. 110-8, admitted by himself, does not form to the plaintiff one single cause of action."

JUDGMENT.

As the counsel for the special appellant is unable to show us that the defendant has any where, in his pleadings, distinctly admitted that his jumma was rs. 110, and the judge has found that the kuboolyut on which the suit is brought, as well as the accounts adduced in evidence by the plaintiff, special appellant, are spurious, and has held that the pottahs filed by the defendant are good and valid, we think there are no sufficient grounds for interfering with the decision of the lower court in special appeal. We dismiss this appeal, with costs.

THE 12TH MAY 1859.

H. T. RAIKES, Esq., Judge, and H. V. BAYLEY, Esq., Officiating Judge.

Petition No. 197 of 1859.

Application for Special Appeal from the decision of Baboo Panchanun Banerjee, Principal Sudder Ameen of Rajshahye, dated 20th December 1858, reversing that of Baboo Kylaschunder Deb, Sudder Moonsiff of Bauleah, dated 28th June 1858.

Dohee Beebee, Plaintiff,
versus

Lallchund and others, Defendants, Petitioners.

Moulvee Murhumut Hossein, for Petitioners, *Ex-parte*.

It is hereby certified that the said application is granted on the following grounds.

A remand postponed for appearance of adverse party.

Petitioners were defendants in the case, and pleaded limitation before the moonsiff, who on that ground dismissed the plaintiff's claim. In appeal the principal sudder ameen has overruled the limitation plea, and decided the case in favor of the plaintiff on the merits.

The point pleaded by the petitioners in special appeal is, that the principal sudder ameen, when satisfied that the moonsiff's order dismissing the claim on limitation was erroneous, should have remanded the case for decision on the merits; by deciding it himself, he has deprived petitioners of an appeal on the facts to a second court.

As the pleader Bhoobunmohun admits that he holds a joint vakalatnamah in this case with Mahomed Ismail, who has the deed, and is not in court, we have heard the case in the presence of Bhoobunmohun, who has examined the decision, and allows that there has been no decision on the merits by the first court.

This being the case, we reverse so much of the principal sudder ameen's finding as affects the merits, and, allowing his ruling on the limitation point to stand, we remand the case to the first court for determination on the merits, without prejudice to either party in appealing therefrom hereafter.

Petitions Nos. 198 and 199 of 1859.

We find now that the opposite party was not represented in two of these cases. They are, therefore, called upon to appear, and the remand order, as respects those cases, postponed for the present.

THE 14TH MAY 1859.

H. T. RAIKES, Esq., Judge, and H. V. BAYLEY, Esq., Officiating Judge.

Petition No. 304 of 1859.

Application for Special Appeal from the decision of Mr. E. F. Latour, Additional Judge of Behar, dated 9th December 1858, affirming that of Sheikh Khyat Alee Khan, Sudder Ameen of Gya, dated 14th June 1858.

Chulloo Koowur, *Plaintiff,*
versus

Doyalnarain and others, *Defendants,* Petitioners.

Baboos Kishenkishore Ghose and Kishensukha Mookerjee, for
Petitioners.

Moonshees Ameer Alee and Abbas Alee, for the Opposite Party.

Case remand-
ed. Though
there was no
defence, the
lower court
should yet have
sifted the proofs
for the prose-
cution.

IT is hereby certified that the said application is granted on the following grounds.

Petitioners were the defendants in the court below, and did not enter an appearance until the case was ripe for decision, when they asked to be heard; but the sudder ameen, remarking that they had only presented themselves as he was recording his opinion on the case, refused to hear them. The suit was then decided in favor of the plaintiff, and the defendants appealed to the judge, who, after observing that the appellants pleaded sickness as cause of absence in the court below, gives a statement of plaintiff's case taken from the plaint, and confirms the decision of the sudder ameen.

The special appeal is, that the judge was bound to test the judicial validity of the sudder ameen's decree in favor of plaintiff by reference to the proof on the record, as, notwithstanding they, the petitioners, had no opportunity of filing a defence in the case, they have a right to a hearing against the evidence tendered by the plaintiff, and the conclusions of the first court in reference thereto.

It does not appear to us that the judge has looked into this case so as to form correct conclusions on the opinion found by the lower court. It may be that, as no defence was placed on record, the judge considered there was nothing before him to refute the plaintiff's statement, and, therefore, deemed it enough to ascertain if that statement was in itself consistent and probable; but, although the defendants put forth no defence, they were entitled to have the case, as contained in the record, sifted and compared with the proofs tendered on the part of the plaintiff, and an opinion from the judge as to the judicial correctness of the lower court's judgment. As the judge's judgment does not satisfy us that this has been properly done, we remand the case for re-trial.

THE 18TH MAY 1859.

C. B. TREVOR and E. A. SAMUELLS, Esqs., Judges, and G. LOCH, Esq.,
Officiating Judge.

No. 703 of 1857.

*Regular Appeal from the decision of Baboo Gobindchunder Chowdhree, Principal Sudder Ameen of Moorshedabad, dated 15th May 1857.*Bejoy Gobind Bural and another, (Plaintiffs,) *Appellants,*
*versus*Messrs. R. Watson and Co., (Defendants,) *Respondents.**Baboo Dwarkanath Mitter, for Appellants.**Baboos Ramapersad Roy, Unmodapersad Banerjee, and Ashootosh Dhur, and Mr. R. T. Allan, for Respondents.*

Suit valued at Rupees 5250-4-0.

THIS suit is brought for the removal of a ferry lately established by the defendants, between and in the vicinity of two ferries belonging to the plaintiffs, whereby the collections from these ferries have been materially diminished and consequent damage has accrued to the plaintiffs. The ferries claimed by plaintiffs are situated at Rughonathgunge and Dufferpoor, and are, as alleged by them, public ferries settled with them, the collections from which form part of the assets of their permanently-settled estate. In Jeyt 1262 (1855) the defendants opened a new ferry at Kallye, where they have established a new bazaar. The ferry was put a stop to by the magistrate on plaintiffs' application, but, on appeal, the magistrate's order was reversed; and plaintiffs now bring the present suit to rescind the order of the judge, to remove the defendants' ferry, and to recover damages consequent on the loss of collections occasioned by the establishment of the new ferry. The grounds on which the removal of the ferry is sought are two: *first*, that plaintiffs' own ferries are public ferries within the meaning of Regulation VI. of 1819, and, therefore, by Clause 1, Section VI. of that law, the defendants have no right to open a new ferry in their vicinity; and, *secondly*, the defendants have no right to the land on either bank of the river, that on the east belonging to Government, and that on the west to the plaintiffs.

Defendants state that they have established a bazaar at Kallye, in their own zemindaree, and have opened a ferry for the convenience of parties coming to the bazaar; that the land on the eastern

damages could be brought, on the ground that the establishment of the detrimental to the collections hitherto realised at the old. Plaintiffs sued for the removal of a ferry recently established by defendants in the vicinity of their ferries, on the ground that their ferries were public within the meaning of Clause 1, Section VI. Regulation VI. 1819, and that the establishment of the new ferry had injured the collections at their ghats. Held, that, though the collections from the plaintiffs' ferries were included in the assets of the zemindaree when it was permanently settled, those ferries did not, in consequence, come within the meaning of Regulation VI. of 1819, and that no action for new ferry was

bank of the river belongs to them, and, though that on the west bank may belong to plaintiffs, yet that is no reason for putting a stop to their ferry, as there is a public road and ghat on the western bank, to which it plies, and plaintiffs have suffered no injury from the establishment of the new ferry.

The principal sudder ameen dismissed the plaintiffs' suit, and they file an appeal, urging that, as the establishment of the defendants' ferry in the vicinity of their ferries is injurious to them, and as their ferries are public ones, the defendants' ferry should be removed. The counsel for the plaintiffs, when the case was up for hearing, wished to add a further issue, that, as the land on the western bank of the river belonged to the plaintiffs, the defendants had no right to trespass on their property; and he urged that the suit was brought, not merely for loss of collections by the opening of the defendants' ferry, but also for damages for trespass committed on plaintiffs' land. This application was rejected, as it was evident from the plaint, that the object of the suit was to recover damages on account of loss of collections, and to remove the defendants' ferry, not because the defendants committed trespass, but because the continuance of defendants' ferry was injurious to the plaintiffs' collections; for, the fact of the land on the west bank of the river being the property of the plaintiffs, is merely mentioned incidentally in the pleadings, to show that the defendants had no right to establish a ferry at that spot, and not as a ground for claiming damages on account of trespass committed.

With regard to the relief sought by the plaintiffs, we do not think the Court can give it, or award damages arising from the loss of collections consequent on the opening of the defendants' ferry, as prayed for in the present suit. The plaintiffs' ferries are not public ones within the meaning of Regulation VI. of 1819, and, consequently, Clause 1, Section VI. of that law cannot be applied. The defendants plead that the land on one bank of the river belongs to them, and plaintiffs are not in a position to question this allegation, for they admit that they have no right to it. If it belongs to the defendants, they have a perfect right to establish a ferry in any part of it; and, though such ferry should prove detrimental to the collections hitherto realised at the plaintiffs' ferries, yet, we think, no action for damages could be brought on such an account. It is unnecessary for us to consider whether an action would lie for trespass on the plaintiffs' land, for the question is not before us. We dismiss the appeal, with costs.

THE 18TH MAY 1859.

C. B. TREVOR and E. A. SAMUELLS, Esqs., Judges, and G. LOCH, Esq.,
Officiating Judge.

Case No. 686 of 1858.

*Special Appeal from the decision of Peareemohun Banerjee,
Principal Sudder Ameen of Beerbhoom, dated 22nd April
1858, affirming a decree of Moulvee Tofeil Ahmud, Moonsiff
of Kendra, dated 7th December 1857.*

Sreenath Chatterjee and others, (some of the Defendants,)
Appellants,
versus

Ramdeen Bhuttacharj and others, (Plaintiffs,) and Buddunchun-
der Bhuttacharj and others, (Defendants,) *Respondents.*

*Baboos Ramapersad Roy and Premchand Paul and Moonshee
Ameer Alee, for Appellants.*

*Baboos Kishenkishore Ghose and Bhoobunmohun Roy, for
(Plaintiffs,) Respondents.*

THIS case was admitted to special appeal on the 17th November 1858, under the following certificate recorded by Messrs. J. H. Patton and A. Sconce.

"This suit was instituted by Ramdhun Bhuttacharj and others, to acquire a 2-17-3-1 share of kismut Kotaleedanga, as male heirs of Gobindram, deceased. It appears that Gobindram held in all a 4-6-2-2 share, and that, on his death, he was succeeded by his widow Moornomoyee; that she died on 27th Cheyt 1259, and plaintiffs, asserting that the above 2-17-3-1 share devolved upon them, and that they were dispossessed on 25th Bysakh 1250, brought this action in the month of Assin following. Both the lower courts have decided for plaintiffs; and the grounds of special appeal taken by petitioners, defendants, are as follows.

First, it is contended that, as petitioners rely on a deed of sale executed in their favor on 4th Poos 1242, by the widow Moornomoyee, and they held possession of the lands from that date to the date of suit, the claim is barred by the law of limitation.

Second, that the onus of proving that the purchase money, rs. 645, was appropriated to religious purposes, in which the deceased Gobindram and his widow were interested, as well as the maintenance for the widow, lay on plaintiffs.

Third, that plaintiffs, suing for possession in immediate succession to the widow, were bound to prove that the widow had possession of the lands during her life-time.

Fourth, that plaintiffs knew of the sale made to petitioners in 1242, and took no steps, before institution of this suit, to contest the purchase.

In a suit to set aside alienations by a Hindoo widow, limitation runs from her death, previous to which the husband's heirs have merely a contingent interest in the property.

"We observe, that the principal sudder ameen, holding the widow Moornomoyee to be incompetent to effect the asserted sale in favor of petitioners, has ruled that cause of action to the plaintiffs arose with the widow's death, and not with the date of sale. Possibly the principal sudder ameen is right in his judgment in this matter, but the question is of importance, and should, we think, be determined by a full bench. Looking at the case in this light, the principal sudder ameen has not entered into the authenticity of the petitioners' purchase, or into the fact of the possession asserted by them. If, therefore, the principal sudder ameen should have erred on the point of limitation, the third question raised above may also have to be considered.

"With respect to the second ground taken by petitioners, it appears to us that the principal sudder ameen has not erred, in holding that the defendants have failed to prove that the purchase money had been appropriated to the purposes which the law would recognise as a ground for valid sale.

"Upon the fourth point, petitioners fail to set before us any proof of this issue being raised in their pleadings. Upon these two last points the petition is rejected, but we admit the special appeal on the other two."

JUDGMENT.

We find that the point of limitation was decided in this Court on the 27th January 1857, when the suit, which had been dismissed by the lower court, on the ground that it was barred by the statute of limitations, was remanded for trial on its merits. It has uniformly, and with reason, been held in this Court, that limitation in cases such as this was from the widow's death. Until that event occurs, the interest of the husband's heir at law is merely contingent, although he, no doubt, has it in his power to sue during the widow's life-time, if he should consider it necessary for the protection of his interests as reversioner.

THE 18TH MAY 1859.

C. B. TREVOR and E. A. SAMUELLS, Esqs., Judges, and G. LOCH, Esq.,
Officiating Judge.

Case No. 673 of 1858.

*Special Appeal from the decision of Mr. E. Dacosta, Principal
Sudder Ameen of Tirhoot, dated 18th March 1858, affirm-
ing a decree of Moulvee Aboul Burkut, Moonsiff of Durbungah,
dated 21st March 1857.*

Wooma Misserain and another, (two of the Defendants,) *Appellants,*
versus
Byjnath Misser and others, (Plaintiffs,) and others, (Defendants,)
Respondents.

Baboo Kaleeprosunno Dutt, for Appellants.

Baboo Kishenkishore Ghose and Moonshee Abbas Alee Khan,
for Respondents.

THIS case was admitted to special appeal on the 11th of Novem-
ber 1858, under the following certificate recorded by Messrs. J. H.
Patton and A. Sconce.

"This was a suit brought for the purpose of setting aside an
alienation made by the petitioner Roopa Misserain, in favor of the
second petitioner, Mahadeo Dutt, on the footing of a karta-putur
on her adoption. The lower courts have decided for plaintiff—
the principal sudder ameen remarking, that the alienation had
not been made for any purpose recognised by the shastras; that
the widow was incompetent to alienate to the prejudice of her
husband's heirs; and that the widow could not adopt Mahadeo
Dutt without her husband's permission.

"The first point taken in special appeal is, that the ground of the
plaintiffs' action was, that they were the immediate heirs of the
deceased, the widow Mussumat Roopa being entitled to maintenance
only, and, this plea failing, it was not competent to give plaintiffs
further relief. Petitioners, however, have failed to show us that
they raised this issue in appeal before the zillah court.

"Next, it is contended that, though the widow is not competent,
without her husband's permission, to adopt a son who should in-
herit her husband's property, she may legally adopt a son by the
kirteema form, who should be entitled to succeed to her own estate.
Petitioners quote page 101, volume I. *Macnaghten's Hindoo Law*,
in support of this argument; and we admit the special appeal, to
consider whether the decision of the principal sudder ameen should
not on this point be modified.

"Thirdly, it is said that, even for the inheritance of her husband's
estate, it is competent to the widow to designate a karta-putur, who
should be competent to perform the ceremonies of her husband's

Held that, in
a suit in which
the main prayer
of the plaintiffs
is for possession
by right of in-
heritance, it is
not competent
to the Court, on
that claim fail-
ing, to enter
into a consider-
ation of points
which were only
auxiliary to the
main one, and
which were
raised by plain-
tiffs only in or-
der to remove
obstacles to
their immediate
possession.

So much of
the decision of
the lower court,
as declares the
deeds of gift
and adoption in-
valid, reversed,
and the special
appeal dismiss-
ed, with costs.

shraddh, i. e. that the duties and the rights of the next male heirs of her husband may be set aside at the discretion of the widow. But petitioners have not quoted any authority to countenance this doctrine.

"*Lastly*, it is said that the decision of the lower court is too general in so far as it may be taken to prohibit alienations which, under the law, a widow may be competent to effect. It seems to us, however, that the principal sudder ameen has not gone beyond the issue raised in the suit before him."

JUDGMENT.

The plaintiffs sued for possession of certain property which was in the present possession of the defendant, who is only entitled to maintenance, and which was theirs by right of inheritance, by reversal of a deed of gift and adoption executed by the defendant in favor of Mahadeo Dutt. They sued also for the registration of their names.

The lower court held, that the defendant was entitled to retain possession of her husband's property during her life-time, but without the power of alienation ; that the adoption made by her of, as well as the deed of gift to, her husband's nephew, Mahadeo Dutt, was illegal under Hindoo law.

The principal sudder ameen affirmed in appeal the decision of the munsiff.

It is now urged in special appeal that, as the plaintiffs' suit was brought mainly for immediate possession by right of inheritance, and as they have been unsuccessful on this point, and the widow has been declared entitled to possession of her husband's property for life, the lower courts should at once have dismissed plaintiffs' claim, and not have gone into subordinate points, which were only dependent on the decision of the main point being given in their favor.

On reverting to the plaint, we think it is beyond doubt that the suit of the plaintiffs was mainly for possession by right of inheritance. The plaintiffs allege that the petitioner Wooma Misserain was only entitled to maintenance, and they pray that the deed of gift and adoption executed by defendant, on the supposition that she has no right in the property, should be set aside. The lower courts have found that the defendant is entitled to possession during her husband's life-time, without the power of alienation, and they have also found that the deeds of gift and adoption executed by her are invalid under Hindoo law.

We think that, as the main prayer of the plaintiffs, that for possession by right of inheritance, has failed, it was not competent to the lower courts to enter in this case into a consideration of points which were made in the plaint only auxiliary to the main

one, and which were only raised by plaintiffs in order to remove obstacles to their immediate possession. As, however, the widow herself is an obstacle to them, and their right to immediate possession, by virtue of inheritance, has failed, the suit of plaintiffs, as brought by them, should have been at once dismissed. Under this view we reverse so much of the decision of the lower court as declares the deed of gift and adoption invalid, and decree the special appeal, with costs. The widow being in possession, it is of course competent to plaintiffs, as the heirs of her husband, and reversioners, to protect their interests in any way they may think most advisable.

THE 18TH MAY 1859.

C. B. TREVOR and E. A. SAMUELLS, ESQS., Judges, and G. LOCH, ESQ.,
Officiating Judge.

*Special Appeals from the decision of Mr. E. Latour, Judge
of the 24-Pergunnahs, dated 20th May 1858, reversing a
decree of Baboo Neelmonee Mitter, Moonsiff of Chowkee Sulkea,
dated 8th June 1857.*

Case No. 745 of 1858.

Anundchunder Mytee, (one of the Defendants,) *Appellant*,
versus
Imamooddeen Sheikh, (Plaintiff,) and Bholanath Koond Chowdhree
and others, (Defendants,) *Respondents*.

Case No. 746 of 1858.

Anundchunder Mytee, (one of the Defendants,) *Appellant*,
versus
Guzzubodeen, (Plaintiff,) and Bholanath Koond Chowdhree and
others, (Defendants,) *Respondents*.

Case No. 747 of 1858.

Anundchunder Mytee, (one of the Defendants,) *Appellant*,
versus
Kamoo Sirdar, (Plaintiff,) and Bholanath Koond Chowdhree and
others, (Defendants,) *Respondents*.

Case No. 748 of 1858.

Anundchunder Mytee, (one of the Defendants,) *Appellant*,
versus
Torab Mundul, (Plaintiff,) and Bholanath Koond Chowdhree and
others, (Defendants,) *Respondents*.

Case No. 749 of 1858.

Anundchunder Mytee, (one of the Defendants,) *Appellant*,
versus

Kumuroodeen Sirdar, (Plaintiff,) and Bholanath Koond Chowdhree
and others, (Defendants,) *Respondents*.

Baboo Kaleeprosunno Dutt, for Appellant.

Moulvee Murhumut Hossein, for (Plaintiffs,) *Respondents*.

Case No. 750 of 1858.

Bholanath Koond Chowdhree and others, (some of the Defendants,)
Appellants,
versus

Madhubchunder Majee, (Plaintiff,) and Syud Owlaud Alee, for self
and as heir of Nuzzeer Alee, (Defendants,) *Respondents*.

Baboo Kaleeprosunno Dutt, for Appellants.

Moulvee Murhumut Hossein, for (Plaintiff,) *Respondent*.

Held, that a civil suit to set aside a summary decree is not simply an appeal; it is an appeal, and something more; in other words, although the issue to be tried by the civil authorities is identical with that tried before the revenue courts, the parties are not confined to the same evidence, but can add to that which was filed in the summary proceeding.

THESE cases were admitted to special appeal on the 7th December 1858, under the following certificate recorded by Messrs. B. J. Colvin and G. Loch.

"The petitioner had gained certain summary decrees against certain ryots, who, having sued for their reversal, had their suits dismissed by the moonsiff in affirmation of the summary decrees. The judge has, however, in appeal, reversed the moonsiff's decisions, thereby setting aside the summary awards. The judge has considered that these awards were founded upon no evidence. It is objected, in special appeal, that the judge should not have overlooked the moonsiff's decrees, which he has done entirely, and considered only the summary cases, whereas the moonsiff's decisions were those in appeal before him.

"We admit these special appeals, to try the correctness of the judge's orders."

JUDGMENT.

Held, also, that civil suits can be brought to reverse summary decrees either in consequence of their illegality, or of their non-conformity with justice. In the former class of cases, the legality of the summary decree is the sole point in issue.

The petitioner in these six cases sued summarily certain ryots, mainly on their kuboolyuts, and obtained decrees against them. Suits were subsequently instituted by the ryots in the civil court, to set aside those summary decrees. They were dismissed by the lower court; but on appeal, the judge reversed the order of the lower court, holding that there was no legal evidence before the collector at all, and that, consequently, any decision not founded on evidence is, as a judicial proceeding, utterly bad; those decisions cannot stand.

In the latter, the sole issue is on the merits, and the civil courts have only to look to the matter in issue as it is before them, and not as it was before the revenue court.

Case remitted to the judge for re-investigation with reference to the Court's remarks.

It is now urged before us by the respondent below that, as the present cases were brought to reverse the summary decrees on the merits, the judge should have looked at the evidence on the record before him, and not have decided the appeal from the moonsiff's decree by a reference to the decree of the collector, but after a consideration of all the evidence which had been before the moonsiff.

A civil suit brought to set aside a summary decree is not simply an appeal. It is an appeal, and something more ; in other words, although the issue to be tried by the civil authorities is identical with that tried before the revenue court, the parties are not confined to the same evidence, but they can, to any extent, that they may feel inclined, add to that which was filed in the summary proceedings.

Civil suits can be brought to reverse summary decrees, either in consequence of their illegality, or of their non-conformity with justice. In the former class of cases, the legality of the summary decree is the sole point in issue. A case of this character is to be found reported at page 1780 of the Decisions of 1858, in which the civil suit was brought to reverse the summary *ex-parte* decrees passed by the collector, inasmuch as the processes, required by Clause 3, Section XVIII. Regulation VIII. of 1819 to be taken out against a defendant before an *ex-parte* decision can be passed against him, had not been properly issued. The Court found that the processes had not been taken out as required by law, and it consequently, in special appeal, affirmed the order of the judge, reversing the summary decree on that ground. In the latter class of cases, *viz.* that of civil suits, brought to reverse summary decrees on the merits, the sole issue is on the merits, and the civil courts have only to look to the matter in issue as it is before them. Any defective enquiry by the collector, if that defect be supplied before them, would be no cause for reversing the summary decree ; neither would any irregularity before the revenue court be alone in such a case sufficient for the reversal of that decree in such cases, as has been held by this Court in the case of Meer Mahomed Tukee, appellant, *versus* Seebram Ghosal, * respondent. The whole merits of the claim, as it is before the civil court, and not as it was before the revenue court, is to be regarded, and a decision come to, founded on such a consideration.

The present suits are clearly within the category of the cases last mentioned. It was, consequently, incumbent on the judge to have looked at the whole matter in issue as it is on the record before him, and not as it may have been before the collector ; and, as he has not so acted, his present decision cannot stand. We remit the cases to the judge, with directions that he re-investigate them, keeping in mind the remarks which have been made above.

* Decisions of 1850, page 200.

THE 18TH MAY 1859.

H. T. RAIKES and J. H. PATTON, ESQS., Judges, and H. V. BAYLEY, ESQ.,
Officiating Judge.

Special Appeals from the decision of Mr. R. Abercrombie, Additional Judge of Chittagong, dated 9th June 1857, reversing a decree of Moulvee Ameerooddeen, Moonsiff of Deeang, dated 16th February 1856.

Case No. 84 of 1858.

Musst. Sabirra Beebee, (Plaintiff,) *Appellant,*
versus

Musst. Dewan Beebee and others, (Defendants,) *Respondents.*

Moulvees Murhumut Hossein and Ahmed Alee, for Appellant.

Moulvee Aftaboodeen Mahomed, for Azuloodeen Mahomed, Respondent.

Case No. 85 of 1858.

Jehan Buksh and Kureem Buksh, (Plaintiffs,) *Appellants,*
versus

Azuloodeen Mahomed and others, (Defendants,) *Respondents.*

Moulvee Ahmed Alee, for Appellants.

Moulvee Aftaboodeen Mahomed, for Respondents.

Case No. 86 of 1858.

Musst. Sabirra Beebee, (Plaintiff,) *Appellant,*
versus

Azuloodeen Mahomed and others, (Defendants,) *Respondents.*

Moulvee Ahmed Alee, for Appellant.

Moulvee Aftaboodeen Mahomed, for Dewan Beebee, Respondent.

The collector having purchased an estate, and engaged with a shikmeedar within it, reserving right of sale of the shikmee, the tenure was a salable one within the meaning of Section VIII. Regulation VIII. of 1819; but the zemindar only, and not a farmer, had power to sell the tenure. Order of the moon-siff upheld against the decision of the judge.

THESE cases were admitted to special appeal on the 2nd February 1858, under the following certificate recorded by Messrs. A. Sconce and J. S. Torrens.

"The petitioner was plaintiff in this suit, which she instituted to set aside the sale of a talook belonging to her, which had been sold for arrears of rent under the provisions of Regulation VIII. of 1819.

"It appears that the talook in question is a sub-tenure within the estate named turuf Kolabeebee, which, by purchase, had become the property of Government; that on re-settling this estate the collector inserted a condition in the plaintiff's kuboolyut, to the effect that, on arrears being due thereon, the talook should be liable to be sold for their realisation; and that, subsequently, the estate was farmed to Sheikh Obedoolah Khan, by whose representation the sale now contested was applied for, and through the collector, carried through.

"The first court quashed the sale, but plaintiff's suit has been dismissed by the judge ; and the ground of special appeal is that, granting that the collector, acting for Government, on the footing of a zemindar, might have enforced the condition of the kuboolyut, by selling the talook for arrears of rent under the provisions of Regulation VIII. of 1819, nevertheless, the collector was not competent to transfer to a farmer the same power to sell. Petitioner grounds her plea on the Constructions Nos. 461 and 523.

"The zillah judge takes the distinction, that the Constructions in question may apply to putnee talooks, but not to other talooks salable under the same law. We observe, however, that the Constructions were based on the presumption that the powers of sale, conferred by Regulation VIII. of 1819, applied personally to proprietors only, and, possibly, the same principle applies to sales of tenures salable under Section VIII. as of purely putnee talooks. But the proper legal effect of Constructions Nos. 461 and 523 is a matter of much importance. These Constructions seem to rule that the right, secured to a zemindar by Regulation VIII. of 1819, to effect a sale cannot be assigned by him to a farmer who, under the conditions of his lease, becomes the representative of the zemindar.

"We admit the special appeal, to try the issue raised by petitioner."

JUDGMENT.

The finding of the judge in this case, on the facts, is as follows. The plaintiff held a shikmee tenure in an estate purchased by Government, and the collector, after the sale, altered the engagement of the under-tenant, and inserted a clause to the effect that a right of sale was reserved with the Government, as zemindar, under the provisions of Regulation VIII. of 1819. Subsequently the estate was let in farm to the defendant, and the engagements of the talookdar made over to him ; and the farmer, in conformity with the Clause above mentioned, procured the sale of plaintiff's tenure under Regulation VIII. of 1819. Plaintiff, on the ground that such sale is invalid under Constructions Nos. 461 and 523, sued to set it aside. The moonsiff applied those Sections, and reversed the sale ; but the judge has held that, as the tenure is not a putnee tenure, though the sale was held under Regulation VIII. of 1819, the Constructions quoted, applying to putnee tenures only, are no bar to the sale of plaintiff's shikmee talook at the request of the farmer. The special appeal is apparently admitted to try the validity of the judge's ruling.

We are of opinion that the clause inserted by the collector, by which a right of sale in the course of the year is reserved to the Government, clearly brings the plaintiff's tenure within the description given in Section VIII. Regulation VIII. of 1819, of tenures salable under that law ; and as the power of sale is conferred by that

section on zemindaree proprietors only, and Constructions Nos. 461 and 523 declare that proprietors cannot delegate this power to farmers, the sale in this instance, made by a farmer, is contrary to law ; and, therefore, under the authority of the Constructions above specified, the order of the judge is set aside, and that of the moonsiff upheld, with costs.

The above decision governs cases Nos. 85 and 86 of 1858.

THE 18TH MAY 1859.

H. T. RAIKES and J. H. PATTON, ESQS., Judges, and H. V. BAYLEY, ESQ.,
Officiating Judge.

Cases Nos. 542, 543, and 544, of 1858.

Special Appeals from the decision of Mr. E. Jenkins, Additional Judge of Sarun, dated 15th January 1858, reversing a decree of Syud Mahomed Wajid, Moonsiff of Sewan, dated 17th May 1856.

Dabeechurn, (Plaintiff,) Appellant,

versus

Bheem Roy and others, (Defendants,) Respondents.

Baboo Kishensukha Mookerjee, for Appellant.

Baboo Ramapersad Roy and Moonshee Ameer Alee, for Nubbee Buksh, Respondent.

Baboo Unnodapersad Banerjee, for Respondents.

There not
having been any
miscarriage in
the lower court's
proceedings, or
der confirmed.

THESE cases were admitted to special appeal on the 30th August 1858, under the following certificate recorded by Messrs. C. B. Trevor and H. V. Bayley.

"Plaintiff sued the village proprietors for possession of 33-17 of land appertaining to the village of Jasowlee Bahowlee, in virtue of a mookurruree pottah, dated Assin 1248. The moonsiff gave plaintiff a decree for half the claim, he being of opinion that the claim of one Nubbee Buksh to 8 annas share of the village, in virtue of a conditional sale, which had been foreclosed at the date of the granting of the pottah, was a valid one.

"Three appeals were preferred to the judge against the moonsiff's decision : one by plaintiff, who claimed a decree in full ; another by the village proprietors, who allege that the deed propounded by plaintiff is spurious ; and a third by Nubbee Buksh, who demands his costs, which had been refused to him by the moonsiff. The judge was of opinion that the execution of the pottah was not proven. 'It does not bear,' he remarks, 'the signature of any parties, either that of the village proprietors, who are said to have granted it, or of any subscribing witnesses, in whose presence its execution was completed.' He therefore considered it a worthless document, and

dismissed the plaintiff's appeal, and decreed the appeal of Nubbee Buksh and the village proprietors. Against the decision passed in these three cases plaintiff below now appeals specially. He urges: 1st, that the judge has misread the pottah, that in the place of containing no name it contains the names of Juggul and Issur, the owners of one 8 annas, and Ramchurn and Gunnes, the owners of the other 8 annas, of the property; and 2nd, that if there were no subscribing witness to the deed, the judge should have looked at the other evidence, both documentary and oral, filed by petitioner, and on the record.

"We think the decision of the judge is erroneous on the first point and defective on the second. We, therefore, admit the appeal, to try whether the case should not be remanded to him for re-investigation."

JUDGMENT.

Now that the original pottah has been produced before us, we find that the judge was quite right in holding that it does not bear the signature of the parties executing it, or of any subscribing witnesses. There has been, therefore, no miscarriage on the part of the lower court, as assumed in the certificate; and we dismiss the appeal, with costs.

This decision governs the cases numbered severally 543 and 544.

THE 18TH MAY 1859.

H. T. RAIKES and J. H. PATTON, Esqs., Judges, and H. V. BAYLEY, Esq.,
Officiating Judge.

Case No. 609 of 1858.

Special Appeal from the decision of Baboo Taruknath Sein, Principal Sudder Ameen of the 24-Pergunnahs, dated 24th February 1858, affirming a decree of Mr. S. Wright, Moonsiff of Maniktollah, dated 13th March 1857.

Bydnath Dass, (Defendant,) Appellant,
versus

Gooroopersad Roy Chowdhree, (Plaintiff,) Respondent.

Baboo Dinonath Bose, after him Baboo Ramanath Bose, for Appellant.

Baboos Shumbhoonath Pundit and Kishenkishore Ghose, for Respondent.

THIS case was admitted to special appeal on the 23rd September 1858, under the following certificate recorded by Messrs. C. B. Trevor and H. V. Bayley.

tioner when he appealed from the decision of the court of first instance to the lower appellate court, from the judgment of which he now appeals specially.

Special appeal rejected, the plea in it not having been urged by petitioner.

"Gooroopersad Chowdhree sued defendant, petitioner, for the amount of rent due by him for the year 1262, according to notice issued on him under Regulation V. of 1812. Defendant denies the right of plaintiff to raise his rent at all, seeing that he had a pottah, from the party whose right and interest plaintiff had purchased, fixing his rent. He urged also that the notice had never been served upon him.

"The moonsiff found that the pottah set up by defendant was not proved, and that the notice had been correctly issued under Regulation V. of 1812. He, therefore, gave plaintiff a decree. The principal sudder ameen also discredited defendant's pottah, and gave plaintiff a decree, making no mention of the service or non-service of the notice under Regulation V. of 1812.

"Defendant now appeals specially, urging that, until the principal sudder ameen has found that the notice has been issued correctly upon him, a decree for the increased rent for 1262 cannot be passed, and that, consequently, in its present form, the enquiry is defective.

"We think that, as the plaint is laid for the sum mentioned in the notice, and for the very year in the month of Bysakh of which the notice was issued, it was incumbent on the principal sudder ameen to find explicitly, either from the evidence, or from the admission or non-objection of defendant, that the notice was formally issued; and that, not having done this, but being altogether silent on the point, his decision is, in its present state, defective. We therefore admit the special appeal, to try whether the case should not be remanded, in order that the principal sudder ameen may supply the defect above noticed."

JUDGMENT.

The point of the due service of the notice was not, it is admitted by the special appellant's pleader, a plea urged in that appeal of his to the principal sudder ameen from the decision in which this special appeal is made. The special appellant's pleader urges, that it was so *in the first appeal* he made. But we find that the first appeal resulted in a remand and in a second finding against special appellant by the court of first instance; but in the second appeal by special appellant, he did not touch the point of the service of notice.

We do not, therefore, think it right to consider the point, as it was not urged in the defendant's appeal from the decision of which he now appeals specially.

We reject the appeal, with costs.

THE 18TH MAY 1859.

H. T. RAIKES and J. H. PATTON, Esqs., Judges, and H. V. BAYLEY, Esq.,
Officiating Judge.

Case No. 634 of 1858.

Special Appeal from the decision of Mr. E. S. Pearson, Additional Judge of Dacca, dated 20th March 1858, affirming a decree of Mr. T. C. Pennington, Sudder Ameen of that district, dated 22nd April 1857.

Radhakishen Chuckerbuttee and others, (some of the Defendants,)
Appellants,
versus

Golukchunder Shah and others, (Plaintiffs,) the Collector of Tipperah and others, (Defendants,) *Respondents.*

Baboo Unnodapersad Banerjee, for Appellants.

Baboo Chundernath Chatterjee, for (Plaintiffs,) Respondents.

Baboo Ramapersad Roy, for (Collector,) Respondent.

THIS case was admitted to special appeal on the 28th September 1858, under the following certificate recorded by Messrs. H. T. Raikes and J. H. Patton.

Judgment in accordance with that dated 30th April 1859, Collector of Tipperah *versus* Golukchunder Shah.

"A similar point to the one raised in this application, namely, whether a putneedar, without disputing the zemindar's demand, is at liberty to pay in the arrears and stay the sale of the putnee on the day of sale, or not, was admitted to special appeal by us on the 23rd instant, in cases Nos. 775 and 832, and we admit this case, and direct that it be brought to hearing at the same time as the other."

JUDGMENT.

The judgment in this admitted special appeal will be in accordance with the ruling of the Court, in the case of the Collector of Tipperah *versus* Golukchunder Shaha and others, dated 30th April 1859. Appeal decreed, with costs.

THE 18TH MAY 1859.

H. T. RAIKES and J. H. PATTON, Esqs., Judges, and H. V. BAYLEY, Esq.,
Officiating Judge.

Case No. 588 of 1858.

*Special Appeal from the decision of Mr. Charles Mackay,
Principal Sudder Ameen of Sylhet, dated 4th March 1858,
reversing a decree of Baboo Hurogobind Bose, Moonsiff of
Russoolgunge, dated 20th October 1857.*

Hurgobind Chowdhree and others, (Plaintiffs,) *Appellants,*
versus

Sheikh Sonaoollah and others, (Defendants,) *Respondents.*

*Baboos Shumbhoonath Pundit and Kishenkishore Ghose, for
Appellants.*

*Moonshee Ameer Alee and Moulvee Mahomed Iemal, for Bad-
oollah and Ussanoollah.*

Remanded in
accordance with
precedent cited.

THIS case was admitted to special appeal on the 18th September 1858, under the following certificate recorded by Messrs. C. B. Trevor and H. V. Bayley.

"Hurgobind Roy and others, petitioners, sued Sheikh Sonaoollah for the recovery of certain lands appertaining to talook No. 1, pergunnah kismut Uttooagram, from which plaintiffs assert that they were dispossessed by defendants on the 1st Pous 1249 B. E. The defendants pleaded the statute of limitations and other pleas.

"The moonsiff first dismissed plaintiffs' suit, on the ground of limitation. The case on appeal was remanded by the judge, for investigation on its merits, on the 19th January 1857. A special appeal was then preferred to this Court against the order of remand, special appellant contending that the suit was barred by the statute of limitations. This application was rejected by the Court on the 13th July 1857.

"On the merits before the moonsiff the plaintiffs obtained a decree; and the principal sudder ameen on appeal declared the suit barred by the statute of limitations,—he remarking: 'A copy of an order of the Sudder Court, dated 13th July 1857, has been filed by respondent, but as that was passed on summary appeal, and without reference to the record, I do not think that order a restriction on me as regards the trial of the present appeal, on the ground taken up by this Court. The moonsiff's judgment, dated 5th November 1856, dismissing the suit of the now plaintiffs as being barred under the limitation law, I consider to be a correct judgment. His last decision, in reversal of his former one, appears to have been based solely upon the judge's remand order, dated the 19th January 1857.'

"Plaintiffs now appeal specially, urging, after the non-applicability of the statute of limitations had been declared by the judge and the Sudder Court, it was not competent to the principal sudder ameen, on the case coming up to him in appeal, from the enquiry made on the merits by the moonsiff, under a remand for that purpose, again to raise the point of limitation. We admit the special appeal to try the above point."

JUDGMENT.

We are not told that the principal sudder ameen has applied limitation in the second instance of the case coming before his Court to any new finding of fact; and following the ruling of this Court in the case of Gopeenath Surma Chuckerbuttee *versus* Comullochun Aitch and others, decided on the 30th March 1857, we remand the case to the lower appellate court for decision on the merits.

THE 18TH MAY 1859.

H.T. RAIKES and J.H. PATTON, ESQS., Judges, and H.V. BAYLEY, ESQ.,
Officiating Judge.

Case No. 432 of 1858.

Special Appeal from the decision of Mr. E. Jenkins, Additional Judge of Sarun, dated 5th January 1858, reversing a decree of Moulvee Alee Buksh, Moonsiff of Russa, dated 30th July 1856.

Toolsee Mahtoon, (Plaintiff,) *Appellant,*
versus

Jumun and others, (Defendants,) *Respondents.*

Moulvee Aftaboodeen Mahomed, for Appellant.

Baboo Kishensukha Mookerjee, for Respondents.

THIS case was admitted to special appeal on the 14th July 1858, under the following certificate recorded by Messrs. C. B. Trevor and H. V. Bayley.

"Plaintiff sued four defendants on a bond. The moonsiff considered that, as one of these defendants could write, and had not himself signed the bond, he should be released; but the moonsiff decreed the case against the other three. On appeal by these three defendants, the judge held, that 'the validity of the bond is vitiated if there was a forged entry on it of the name of one of the supposed parties to the loan, and that the appellants are clearly entitled to a release from a bond, the genuineness of which is not satisfactorily proven.'

The plea in special appeal being that a lower appellate court, not having gone into the validity of a bond, in regard to three of four parties to its judgment, was defective; held that, as the judge had on appeal decreed the deed invalid altogether as an interpolated document, this plea was inadmissible.

"He observed that the plaintiffs had not appealed from that portion of the moonsiff's decision which had released one of the four defendants ; and that 'under these circumstances, the court cannot enter into the question whether the bond is genuine or not as against all the parties.' The judge accordingly decreed the appeal.

"The special appellant urges that the judge should have enquired into the genuineness of the bond as it affected the other three defendants, inasmuch as the defendants were four brothers, and the three had signed the bond for themselves and the fourth.

"We admit the special appeal, to try whether the judge should not have gone into the validity of the bond in respect to the three defendants against whom the moonsiff had considered it binding, and whether his decision is otherwise correct."

JUDGMENT.

Although the latter part of the judgment of the lower appellate court states that the judge would not go into the question of the genuineness of the bond as against all the parties, it is clear, from the rest of his judgment and from the result of the appeal dismissing plaintiff's case *in toto*, that he has considered it established as a fact on the evidence that the bond was invalid as an interpolated document.

We further observe that, though the vakeel of the special appellant, when the record and the opposite party were not before the Court, stated that the three defendants had signed for themselves and the fourth, he has not been able to substantiate this in any way.

We reject the appeal, with costs.

THE 18TH MAY 1859.

H. T. RAIKES and J. H. PATTON, ESQs., Judges, and H. V. BAYLEY, ESQ.,
Officiating Judge.

Case No. 351 of 1858.

Special Appeal from the decision of Mr. E. Jenkins, Additional Judge of Tirhoot, dated 18th June 1857, reversing a decree of Moulvee Syud Alee Hossein, Officiating Moonsiff of Muhooa, dated 22nd December 1856.

Owdan Singh and others, (Plaintiffs,) *Appellants,*
versus

Mohunt Buzmo Geer, heir and disciple of Mohunt Luchmun Geer,
deceased, (Defendant,) *Respondent.*

Baboo Ramgopal Ghose and Kishensukha Mookerjee, for
Appellants.

Baboo Unnodapersad Banerjee, for Respondent.

THIS case was rejected on the 29th January 1858, under the following order recorded by Messrs. A. Sconce and J. S. Torrens.

"These petitioners have instituted this suit to enforce their right to hold a nimuk sayar mehal on certain lands possessed by defendant. The judge has dismissed the claim, remarking that plaintiffs have failed altogether to show that the 51 beegahs of rent-free lands belonging to defendant is included in their settlement, and, even if this were proved, the settlement would be illegal; for there is no law under which such settlement could be made, so as to enable the party to interfere with the defendant's enjoyment of his rent-free tenure.

The deed of settlement was not specific on the point, whether the land in defendant's possession was part of the land settled for with petitioners. As the lower court had decided the point as a matter of fact, the Court could not interfere. Appeal dismissed.

"The ground of special appeal is that, having the nimuk sayar mehal of the entire village, the settlement extends to the defendant's lands also. But special appellants show us no authority for this assertion of their right; they do not show the settlement itself, nor the condition of it; nor do they rely on any law which gives them the right of entry on the defendant's property. Petition rejected."

A review of the above order having been applied for, the case was admitted to special appeal on the 16th June 1858, under the following certificate recorded by Mr. A. Sconce.

"On the 29th January last, sitting with Mr. Torrens, I concurred in the rejection of an application made by these petitioners, for the admission of a special appeal from the judgment of the additional judge of Tirhoot; and I am now asked to review that order.

"The case relates to the right asserted by plaintiffs, petitioners, to give effect to their settlement of a nimuk sayar mehal over 51 beegahs, claimed as lakhiraj by the defendant. Petitioners are proprietors of a nizamat village, named Mujlispoor Toee, and in addition, to their rights and liabilities under that permanent settlement, they

appear to be considered also proprietors of the nimuk sayar mehal attached to the same village. This nimuk sayar mehal, that is, the control of the manufacture of saltpetre, or the levying of rent or dues from the karindahs employed in the manufacture, is said to have continued khas in the hands of the collector till the year 1253, and to have been settled with the plaintiffs from 1254. The question substantially raised by this suit is, therefore, the right of plaintiffs, by virtue of this settlement, to regulate the manufacture of saltpetre on the 51 beegahs held by defendants.

"In the plaintiffs' settlement, below the entry of Mujlispoor Toee, is entered another item called Toee Pakee, that is Toee as an adjunct to Mujlispoor Toee. According to plaintiffs, petitioners, this second entry covers the defendant's land.

"Upon this point the zillah judge remarks, that it is not proved by any direct evidence, or by the information afforded by the collector, that the second entry of the plaintiffs' settlement represents the defendant's 51 beegahs, otherwise called Muth Toee : and the ground of objection taken by the petitioners is, that the judge has misunderstood and misconstrued the settlement. When their petition of appeal was first heard, petitioners did not bring up any documents by which we could judge of the correctness of the decree of the court below ; but from the papers now before me, and from the judgment of the first court, petitioners seem to me to make out a case for consideration by a full bench.

"Petitioners show how the sayar mehal stood in 1253, and, indeed, in 1252, when still khas, by producing the collector's register. In 1252, the karindah of Toee, the pakee of Mujlispoor, was Doma Nooniya ; and in 1253 they were Doma and Shunkur. Further, it appears, that plaintiffs, when the settlement was about to be made in 1254, objected, before the revenue authorities, to the sayar of Toee Pakee being included in Mujlispoor settlement, because the land was possessed by others ; but that, in spite of their objection, the settlement was assigned to them. Again, it appears that, when the survey was being made, at the express application of defendant, their 51 beegahs were surveyed as part of the nizamat land of Mujlispoor Toee. For these several reasons, there seems to be some reason to doubt whether the judge has rightly interpreted the nature of the settlement entered into with plaintiffs, in so far as the extent of that settlement may be determinable by the existence of the sayar mehal over the disputed lands, while the mehal was held khas, as well as by the express terms of the settlement itself ; and, accordingly, I admit the special appeal, to try that question."

JUDGMENT.

The certificate is very loose as to the point to be decided. But it appears to hold that the judge has misconstrued and misunder-

stood the deed of settlement made with the plaintiff. But we fail to ascertain that the deed of settlement certifies the 51 beegahs of land held by the defendant as part of the settlement concluded with the petitioners. The finding of the judge, therefore, to this effect, does not appear to us to involve a misconstruction of the document. The judge's finding on the facts, therefore, is not to be questioned on the ground mooted by the certificate; and, whether the finding is correct or not, is not a point that we can decide in special appeal. We must, therefore, reject this appeal, with costs.

THE 18TH MAY 1859.

H. T. RAIKES and J. H. PATTON, ESQS., Judges, and H. V. BAYLEY, ESQ.,
Officiating Judge.

Case No. 469 of 1858.

Special Appeal from the decision of Moulvee Ameeroodeen Mahomed Khan, Additional Principal Sudder Ameen of Chittagong, dated 2nd January 1858, reversing a decree of Moulvee Abdool Jubbar, Moonsiff of Zorawurgunge, dated 25th August 1856.

Saadut Alee and others, (Defendants,) *Appellants,*
versus

Mussumat Kuroonamoyee, (Plaintiff,) *Respondent.*

Moulvee Murhumut Hossein, for Appellants.

Moulvee Aftaboodeen Mahomed, for Respondent.

THIS case was admitted to special appeal on the 28th July 1858, under the following certificate recorded by Messrs. C. B. Trevor and H. V. Bayley.

"Mussumat Kuroonamoyee sued Saadut Alee and others for the reversal of the attachment of the crops under Regulation V. of 1812, price of the articles attached, and damages at double that price. The plaintiff stated that her rent to defendants was rs. 13-4, and that she had paid the same to an ijaradar under an assignment by the defendants. The moonsiff found that only one out of four co-sharers of the defendants had signed the assignment; that therefore it was not a legal assignment, and as plaintiff acknowledged the amount of rent due to be rs. 13-4, the amount for which the attachment issued, her suit was dismissed. On appeal the principal sudder ameen reversed the moonsiff's decision, inasmuch as, under Section XIII. of Regulation V. of 1812, a jumma-wasil-bakee had not been served upon the plaintiff, and the attachment was, therefore, illegal. He decrees the plaintiff's claim as laid in the plaint.

"Defendants now appeal specially, urging that the main point in issue was, whether the defendants had assigned the rents to

Case remanded, for re-trial on the proper issue raised by the case, not whether a jumma-wasil-bakee had accompanied the demand of rent, but whether plaintiff had discharged his rent or not under a legal assignment.

an ijaradar, and plaintiff had paid the same under that assignment or not ; that if the assignment was not proved, then plaintiff's suit should be dismissed ; if the assignment and payment by plaintiff under it were proved, then, as nothing would be due from plaintiff, defendants would be justly liable under Section VI. of Regulation XVII. of 1793 ; that the finding of the principal sudder ameen is silent on these points, and is, in its present state, defective and incorrect, and should be remitted to him for re-investigation. We admit the special appeal to try this point."

JUDGMENT.

As there was no dispute raised by the pleadings as to the amount of rent plaintiff had to pay, if liable at all, the substantial issue was, whether the amount had been discharged as alleged by the plaintiff, and not whether the demand had been accompanied by service of a jumma-wasil-bakee account upon her.

This, it appears to us, was the proper issue to try ; and we remand the case to the principal sudder ameen, that he may decide whether or not the rent had been paid by the plaintiff under a legal assignment as pleaded by her.

THE 18TH MAY 1859.

H. T. RAIKES and J. H. PATTON, Esqs., Judges, and H. V. BAYLEY, Esq.,
Officiating Judge.

Case No. 66 of 1858.

Special Appeal from the decision of Mr. E. Jenkins, Officiating Additional Judge of Tirhoot, dated 16th April 1857, affirming a decree of Mr. John Weston, 2nd Principal Sudder Ameen of that district, dated 10th March 1856.

Mr. C. Swain, (one of the Defendants,) *Appellant,*
versus

Sheikh Reazut Alee, (Plaintiff,) and Khoorshed Alahee and others,
(Defendants,) *Respondents.*

Mr. R. T. Allan, for Appellant.

Moulvee Murhamut Hossein, for (Plaintiffs,) Respondents.

Moulvee Aftaboodeen Mahomed, for Pearcee Begum and Shahzadee Begum, Respondents.

THIS case was admitted to special appeal on the 30th January 1858, under the following certificate recorded by Messrs. A. Sconce and J. S. Torrens.

Appeal dismissed ; for plaintiff's payment of revenue in excess of his own share for defendant's benefit, it was in evidence could not include the kist for the month for which defendant claimed a set-off.

" This case was instituted by a zemindar to recover from his co-proprietors their share of the Government revenue which he had paid on their account.

" Against the present petitioner the sum of rs. 344-6-7, besides interest, has been awarded; and the ground of special appeal is, that the judge has not given petitioner credit for the payment of rs. 187-10 made by him into the collectorship, on the 7th June 1852, on account of the kists of April and May.

" The suit was instituted on the 4th July 1854, and, as appears from the statement of the judge, plaintiff's claim was limited to payments made by himself to the last day of payment in 1851-52. For that reason the judge thinks that the payment of revenue for the month of April in the same year 1852, made by petitioner on the 7th June, should not be taken into account.

" We admit the special appeal to try that point."

JUDGMENT.

The pleader for the special appellant has failed to show us that the amount paid by his client in June, referred to in the certificate, and which was credited by the collector on account of revenue for April, has any connection with the time for which plaintiff claims reimbursement of revenue paid by him. The argument of the pleader is that, as the plaintiff alleges that his payments are on account of revenue in excess of his own share, from 1841 to the end of 1851-52, and this covers the month of April 1852, his client's payment of the kist of that month in June, when alone it became due, is a sufficient release from any claim on account of that month, and should be given him as a set-off. But we find that the plaintiff does not allege any thing but payment of revenue *due* up to the end of 1852, and as this does not include the April kist, which was not due until June, it does not follow from the words of the claim, that plaintiff meant he had liquidated the kist of that month, but only the kists up to that time, non-payment of which would subject the estate to sale.

But it is clear that the payments made by plaintiff, and for which he claims reimbursement, could not include the April kist, for, had he paid the kist of that month, the collector would not have credited defendant's payment in June to the kists of April and May, but the subsequent kists. As, therefore, the finding of the judge is, that the April kist is not included in plaintiff's claim, and the fact of defendant's payment having been carried to that account is also *prima facie* evidence that plaintiff had not paid it, and special appellant is unable to show that plaintiff's claim includes it, we see no ground for interference with the judgment passed, and reject this appeal, with costs.

THE 19TH MAY 1859.

H. T. RAIKES, Esq., Judge, and H. V. BAYLEY, Esq., Officiating Judge.

Petition No. 1159 of 1858.

Application for Special Appeal from the decision of Mr. E. F. Radcliffe, Additional Judge of Chittagong, dated 5th June 1858, reversing that of Mr. W. Cordozo, Acting Moonsiff of Raojan, dated 12th February 1857.

Bakir Alee, Defendant, Petitioner,
versus

Mahomed Rowshun, Plaintiff, Opposite Party.

Moulvee Aftaboodeen Mahomed, for Petitioner.

Baboos Kishenkishore Ghose and Obhoychurn Bose, for the Opposite Party.

Case remanded, for re-trial upon the merits. The lower court could not, on appeal, decide upon a special point ruled by a special law, which the court of first instance had not taken up.

It is hereby certified that the said application is granted on the following grounds.

Petitioner was sued for possession of an estate which the plaintiff alleged he had purchased at a Government sale; and petitioner having pleaded that the purchase was benamee, the moonsiff at once rejected the suit under Section XX. Act I. of 1845.

In appeal the judge overruled the decision on the law point, on the ground that the Act applies to suits brought up on such averments; but the petitioner having also pleaded a deed of relinquishment of the property in suit by the plaintiff in his favor, the judge proceeded to try that point, and finding the deed to have been executed on stamp of inadequate value, rejected the deed, and decided the case in plaintiff's favor.

The special appeal is that, as the first court had expressed no opinion on the inadequacy of the stamp, the point being one of a technical nature, the judge could not decide upon it in appeal against the provisions of Act IX. of 1854.

We observe that the judge refers to a precedent of this Court of the 30th April 1855, regarding the value of a stamped deed not being a matter cognizable in appeal when unnoticed by the first court; but he holds that it is overruled by another case decided by the Court in 1858. The judge, however, evidently fails to observe that the later decision has reference to a special point brought under a special law, and cannot, therefore, be regarded as one of those general points open to appeal, and to which the earlier decision refers.

As the deed of relinquishment had not been noticed by the first court, because the investigation there stopped at the ground of action and did not enter upon the question of the deed at all, the judge should have remanded the case for a decision on the merits.

The case is now returned that he may do so. Ordered accordingly.

THE 21ST MAY 1859.

H. T. RAIKES, ESQ., Judge, and H. V. BAYLEY, ESQ., Officiating Judge.

Petitions Nos. 1703 and 1704 of 1858.

Applications for Special Appeal from the decision of Mr. E. DaCosta, 1st Principal Sudder Ameen of Tirhoot, dated 9th July 1858, affirming that of Moulvee Eradut Alee Khan, Sudder Ameen of that district, dated 24th November 1857, in the case of

Bucha Chowdhree, *Defendant*, Petitioner,
versus

Purmesuree Dutt Jha, *Plaintiff*, Opposite Party.

Baboo Kishensukha Mookerjee and Moulvee Aftaboodeen Mahomed, for Petitioner.

Baboo Unnodapersad Banerjee, for the Opposite Party.

IT is hereby certified that the said applications are granted on the following grounds.

Petitioner was one of the defendants in the lower court, and was sued for damages and for the removal of bunds which had caused injury to the plaintiff.

Petitioner was then summoned by the first court; and, as he failed to appear, the court stated that it proceeded to decide the case in accordance with Section XXIV. Act XIX. of 1853, on the record.

The special appeal is that, as the lower appellate court has, on petitioner's appeal, held that the summons alluded to was never served, and that the provisions of Act XIX. of 1853 were not applicable, petitioner was entitled to have his defence and his evidence considered.

As the decision of the lower court absolves petitioner from the consequence of default prescribed by Act XIX. of 1853 for non-attendance, and we presume the case to have been decided as that Act prescribes, we consider petitioner is entitled to have the case re-tried, and remand it to the first court for the purpose.

Case remanded, because, as the provisions of Act XIX. of 1853 concerning default could not apply, petitioner was entitled to a hearing.

THE 23RD MAY 1859.

J. H. PATTON and E. A. SAMUELLS, ESQS., Judges.

Petition No. 873 of 1858.

Application for Special Appeal from the decision of Baboo Kasheeshur Mitter, Principal Sudder Ameen of Hooghly, dated 10th March 1858, reversing that of Moultree Ghulam Rubbanee, Moonsiff of Keerpoy, dated 9th March 1857, in the case of

Collector of Hooghly and others, *Defendants*, Petitioners,
versus

Rajkishen Singh, *Plaintiff*, Opposite Party.

Baboo Ramapersad Roy, for Petitioners.

Remanded under
precedent
cited.

It is hereby certified that the said application is granted on the following grounds.

This is one of those chakeran cases in the Burdwan district, of which several have already been remanded. This will also be remanded on the same grounds as the others, *vide* page 1162 of the Decisions of 1858.

THE 23RD MAY 1859.

H. T. RAIKES, ESQ., Judge, and G. LOCH and H. V. BAYLEY, ESQS.,
Officiating Judges.

Case No. 205 of 1857.

Regular Appeal from the decision of Baboo Doorgapersad Ghose, Additional Principal Sudder Ameen of Jessore, dated 19th December 1856.

Nobinchunder Adhikaree, (Plaintiff,) *Appellant*,
versus

Ranee Bhugobuttee Debea and others, (Defendants,) *Respondents*.

Mr. R. T. Allan and *Baboos Kishenkishore Ghose* and *Sum-*
bhoonath Pundit, for *Appellant*.

Baboo Ramapersad Roy, for *Respondents*.

Suit laid at Rupees 24,499-0-5.

Appeal dis-
missed. Plain-
tiff could not
produce reliable
evidence that
the lands claim-
ed belonged to
his purchased
estate.

THE plaintiff sues to recover possession of 3675 beegahs of land, as appertaining to the village of Bissonath, in his purchased estate of Sreepore, while the defendants assert that the land in question belongs to Dhee Bahadoorpore, and is part of their estate of pergunnah Lushkerpore.

The principal sudder ameen dismissed the claim, on the ground that plaintiff had produced no reliable evidence in support of his claim, while the long possession of the defendants was established ;

and their defence of a resumption suit, brought by the Government for the assessment of some part of these lands, proves defendants to have held a substantial interest in them at the time.

Baboo Kishenkishore Ghose, on the part of the plaintiff, informs us, that the only question involved in this suit is the true position of a natural boundary line between the two estates; that the defendants were themselves the proprietors of the two estates, and allowed the estate of Sreepore to fall into arrears, which was sold and purchased by the plaintiff; that, after plaintiff had been three months in possession, he was dispossessed by the defendants, who alleged that the lands of Sreepore extend to the Chingara khal, running on the north of the disputed lands, which forms the southern boundary of the plaintiff's property, excluding the lands in suit, while the plaintiff claims to carry this boundary on the southern side to the shanta of Bahadoorpore, so as to include the lands in question; that, consequently, the point for determination is, which of these khals or water-courses is the boundary line between the two properties.

The pleader then shows us the report of Hualoodeen Ameen, who was deputed by the court to make a local enquiry, and who describes the water-course alleged by the defendants to be the natural boundary between the estates, as nothing but an artificial ditch, which must have been dug out, and cannot be the Chingara khal assumed by the defendants, while the appearance of the shanta on the south of the disputed lands shows it to be a water-course flowing from the Pudda, and is the only natural boundary existing between the estates, and divides the lands of the contending parties, including those in suit within the area of the plaintiff's estate. But we find the lower court has rejected this report as partial and untrustworthy, *1st*, because this opinion of the ameen in question, as to the boundary line of Bahadoorpore, is directly opposed to another report furnished by him in another and earlier case; and, *2nd*, because the moonsiff, who was subsequently deputed to map and report upon this locality, describes the Chingara khal, which the ameen calls an artificial ditch, as a wide and natural water-course, and showing no signs of artificial construction. The rejection of the ameen's report, therefore, on these grounds, appears to us both reasonable and right.

The only remaining evidence relied upon by the pleader is an old mouzawaree paper, filed in the office of the collector of Rajshahye by the canoongoes in 1827. This paper purports to give certain particulars of the village of Mahadewan, mehal Sreepore, a village of the plaintiff; and amongst the particulars recorded, it gives the boundaries of the village in question, stating that the shanta of Bahadoorpore forms the southern extremity. Great stress is laid by the pleader on the importance of this record and its infallibility

as valid proof of the facts recorded in it. But we observe that the copy before us bears no certificate that the original was ever authenticated before any authority, and we cannot admit such a paper to be *conclusive* evidence of any thing recorded in it, and, unless supported by further evidence, we can allow it no weight in the present case. It is, however, admitted, that it stands alone, and we therefore coincide with the lower court in holding it to contribute no material evidence in plaintiff's favor.

There is nothing more on the record but the depositions of the witnesses, which the lower court refused to credit, as made by persons living at a distance, and whose acquaintance with the localities was only acquired during occasional visits for the purchase of kullye, &c. On such evidence no reliance can be placed, and, though willing to give all consideration to the pleader's arguments, that his client had to prove his case against parties who held possession before him as proprietors of the same estate, we still consider he was bound to produce more substantial evidence than we find on the record.

Seeing then no reason to interfere with the decision passed, we confirm the lower court's decree, with costs of this appeal on the appellant.

THE 25TH MAY 1859.

E. A. SAMUELLS, Esq., Judge, and G. LOCH, Esq., Officiating Judge.
Petitions Nos. 845 and 846 of 1858.

Applications for Special Appeal from the decision of Mr. E. F. Radcliffe, Additional Judge of Chittagong, dated 8th March 1858, affirming that of Moulvee Sookoor Alee, Moonsiff of Futikcherree, dated 18th December 1857, in the case of

Buddecoodeen Ahmed, (*Plaintiff*.) Petitioner,
versus

Mahomed Vasil and others, *Defendants*.

Moulvee Aftaboodeen Mahomed, for Plaintiff, Petitioner, *Ex-parte*.

Remanded under precedent.

It is hereby certified that the said application is granted on the following grounds.

These cases were struck off below, on the ground that the reasons of appeal were not filed within the thirty days allowed by law for the filing of the appeal itself.

We remand them for trial under the precedents of this Court of the 1st February 1859 (page 109), and the 23rd idem (page 190).

THE 26TH MAY 1859.

C. B. TREVOR and E. A. SAMUELLS, ESQS., Judges, and G. LOCH, ESQ.,
Officiating Judge.

Case No. 761 of 1858.

*Special Appeal from the decision of Mr. F. A. Glover, Officiating
Judge of Rungpore, dated 29th April 1858, affirming a
decree of Muddunmohun Dutt, Moonsiff of Buddeakhalee,
dated 27th December 1856.*Gopalchunder Surma Roy, (Plaintiff,) *Appellant,*
*versus*Tarasoonderee Debea, heir of Gungamonee Debea, deceased,
(Defendant,) *Respondent.**Moonshee Ameer Alee and Baboo Unookoolchunder Mookerjee, for*
*Appellant.**Mr. R. T. Allan and Baboo Kishenkishore Ghose, for Respondent.*

THIS case was admitted to special appeal on the 13th December 1858, under the following certificate recorded by Messrs. B. J. Colvin and G. Loch.

Held, that as the debt out of which the present suit has arisen was a personal one of Kunukmonee, those persons who succeeded to her property, and those only are liable for her debts, and that to the extent of the property acquired from the deceased. In order, therefore, to determine whether the defendant, Tarasoonderee Debea, the step-daughter of Kunukmonee, is liable or not, it is necessary to ascertain whether she succeeded by will, or otherwise, to any property, for, by inheritance, she could not, under Hindoo law, succeed her step-mother

"The plaintiff, petitioner, sued the defendant Tarasoonderee, to recover the amount of a debt due by Kunukmonee, to whose personal property, it was alleged, Tarasoonderee, her daughter, had succeeded. The moonsiff gave a decree for the plaintiff against the effects of the deceased Kunukmonee, and an appeal was preferred by the plaintiff to make Tarasoonderee also answerable in her own effects for the amount of the debt. The judge gave a decree in accordance with the prayer of the plaintiff, appellant. A special appeal was filed by Tarasoonderee, who denied having possession of Kunukmonee's personal effects; and this Court, on the 5th January 1858, (Decisions, page 2,) remanded the case to the judge, directing him to consider the statements actually made in the petition of Chunder Dass on the part of Tarasoonderee, as to whether they really showed that the petitioner had succeeded to any personalty belonging to Kunukmonee. On remand, the judge found that Tarasoonderee had succeeded to the personal effects of her mother, but they had subsequently been forcibly taken from her, and therefore she ought not to be held liable for the debts of the deceased; and he adds that, even were it established that Tarasoonderee kept possession of her stepmother's personalty, his previous decision would still have been incomplete with reference to the Sudder Dewanny Adawlut's ruling in the case of Dyamoyee, dated the 20th February 1856. He, therefore, confirms the order of the lower court.

As this point has not been completely and clearly ascertained, the case is remanded, in order that certain enquiries may be made and a decision passed in conformity with the facts as they may eventually be found to be.

"Two objections are taken in special appeal: 1st, that, as the defendant Tarasoonderree inherited the personal property from her mother, the act of a third party forcibly depriving her of possession does not release her from her responsibility to pay the debts of her mother, for she has an action against the wrongdoers who deprived her of the property; 2nd, that the judge is in error in supposing her liability limited to the extent of the property actually inherited by her, for, according to the Hindoo law, any party inheriting from another makes himself responsible for all the debts incurred by the party from whom he inherits, irrespective of the value of the property inherited. We admit the special appeal, to try whether, with reference to the above objections, the judge's decision is correct or not."

JUDGMENT.

This case was remitted to the judge on the 5th January 1858, by this Court, in order that he might attentively consider the nature of the statements actually made in the petitions of Chunder Dass, the agent of the petitioner Tarasoonderree Debea, as to whether they really showed that the petitioner succeeded to any personalty belonging to Kunukmonee, and pass eventually a fresh decision in the case.

On re-investigation, the judge was of opinion that his former decision was incorrect. He still thought, however, that the petition and deposition of Chunder Dass, the agent of Tarasoonderree Debea, afforded a strong presumption that his mistress succeeded to the personalty of her deceased stepmother. Whatever, however, she did take possession of, was forcibly taken away from her; and as she never recovered the property, the judge considered that she should not be made liable for the debts incurred by the deceased proprietress. Moreover, as the amount of property to which Tarasoonderree succeeded had not been proved, the judge considered that, even had she retained possession of that which she had acquired from her stepmother, he could not, under the precedent of this Court, in the case of *Dyamoyee Debea versus Bindabunchunder Banerjee*,* have given a decree against her, without limiting it in execution to the extent of the property acquired by her from the deceased.

The plaintiff has now come up in special appeal, urging, 1st, that, as Tarasoonderree inherited the personal property of her mother, the act of a third party forcibly dispossessing her would not release her from responsibility, as she has an action against the wrongdoers; and, 2nd, that, under the Hindoo law, a party inheriting from another is responsible for all the debts incurred by that person, irrespective of the value of the property inherited, and, consequently, that the judge should not have considered this point, but, on inheritance being proved, have given special appellant a decree.

*Decisions of 1856, page 97.

It has been urged before us by Baboo Kishenkishore Ghose on the part of special respondent, Tarasooderee Debea, that Kunukmonee was his client's stepmother; and that, under Hindoo law, under no circumstances could a person, standing in that relation to a deceased person, inherit; and again that, whether the property alleged to have come into the possession of Tarasooderee was Kunukmonee's own property (streedhun) or her husband's, in which case it would not be liable for Kunukmonee's personal debts, does not appear from the record.

That the debts for which the present suit was brought was a personal one of Kunukmonee is not questioned. It seems clear, then, that the persons who succeeded to the property of Kunukmonee Debea, and those only, are liable for the debts, to the extent, that is, of property acquired from the deceased.

Under these circumstances, a satisfactory decision cannot be come to in the present case, until it is clearly determined whether Tarasooderee, by will or otherwise, (for by inheritance she could not succeed,) acquired any property from the deceased Kunukmonee, or not.

With a view of elucidating this point, as Tarasooderee and Kunukmonee lived in the same house, the circumstances under which the property belonging to Kunukmonee after her death came, if it did come, into Tarasooderee's possession, should be enquired into. Was it for simple custody, in which case she would not be liable, or were any acts regarding that property evidencing appropriation done by Tarasooderee, rendering her liable in an action like the present; and again, what property was forcibly taken from Tarasooderee by her brother, to whom did it belong, was it the peculiar property of Kunukmonee, or did it belong to her deceased husband and their father Kissoreegobind, and on what plea was it forcibly taken from her after the death of Kunukmonee, should also be ascertained.

On these facts being clearly answered, one way or the other, the court below will then be in a position to say whether, looking to the relation between Tarasooderee and Kunukmonee, any property belonging to the latter came into the possession of the former in such a mode as to render her liable. If any such came, a decree may pass against Tarasooderee Debea, only to the extent of any property so acquired by her, for, notwithstanding that the payment of all the debts due by an ancestor is incumbent on an heir as a moral duty under Hindoo law, it is not enforced as a legal obligation by our courts. If none such came, she should be released from liability.

The case is remitted to the judge for re-investigation on the points above noticed.

THE 26TH MAY 1859.

H. T. RAIKES, ESQ., Judge, and H. V. BAYLEY, ESQ., Officiating Judge.

Petition No. 380 of 1859.

Application for Special Appeal from the decision of Baboo Panchanun Banerjee, Principal Sudder Ameen of Rajshahye, dated 10th December 1858, reversing that of Baboo Kedarnath Banerjee, Moonsiff of Shahazadpore, dated 29th April 1857, in the case of

Pertabchunder Banerjee, *Plaintiff*, Petitioner,
versus

Nundocomar Banerjee and others, *Defendants*, Opposite Party.

Baboo Gopal Lal Mitter, for Plaintiff.

Baboo Moheshchunder Chowdhree, for Defendants.

In a case where both parties admitted there was no divided possession of a cutcheree in suit, held, that an issue to try that point was unnecessary.

Where also plaintiff's claim fell short of what defendants admitted to be the value of the items in suit, held, an order for remand for trial of these points was not requisite.

Held, further, that the lower court should not have recorded what would be the result of plaintiff's failing to prove a particular issue, until the final decision of the suit.

IT is hereby certified that the said application is granted on the following grounds.

The special appellant urges that this case has been remanded unnecessarily; inasmuch as the issues, for trial of which the principal sudder ameen remanded the case, involved matters not in dispute, as shown by the record and pleadings.

We observe that the issues on which the remand was made were these.

First, that the moonsiff should enquire if the land of the cutcheree was held ijmalee as heretofore, or whether each partner held his share according to the definition made by the arbitrators.

Second, that he should enquire what was the value in money to be given to plaintiff, as an equivalent, in case his share of the cutcheree building fell short of his share of the land allotted to him, that is, in case a greater proportion of such building was in the shares of land of other sharers.

Third, what cost was to be defrayed to plaintiff on account of filling up earth to render the building firm and safe.

We find, as to the *first* issue, that both parties admit there was no separate possession of the building amongst the sharers; or, in other words, that the definition of shares of the land of it by the arbitrators was never given effect to.

On the *second* and *third* points we find that the plaintiff's claim fell short of what defendants are found by the moonsiff to have admitted as the value.

Under these circumstances, the principal sudder ameen's reasons, as now given for the remand, seem insufficient, and he is desired to certify, if he had other reasons, what they might be; and, further, the Court remark, he ought not to have declared, as he has done,

what would be the result to the plaintiff of failure of proof of an issue, until the final decision of the suit.

Since these orders were given, we have been informed by the special respondent that the moonsiff has re-decided the case on the above remand. But special respondent could not produce a certified copy of this. If, however, the pleader's statement be correct, these orders of this Court will, of course, be suspended as far as relates to the principal sudder ameen's certifying further his reasons for the remand order he gave.

THE 26TH MAY 1859.

C. B. TREVOR and E. A. SAMUELLS, ESQS., Judges, and G. LOCH, ESQ.,
Officiating Judge.

Case No. 608 of 1857.

Regular Appeal from the decision of Baboo Peareemohun Banerjee, Principal Suddler Ameen of Beerbhoom, dated 15th April 1857.

Frankishen Dhur and Soodhakishen Dhur, (Plaintiffs,) *Appellants,*
versus
Kishenchunder Chuckerbuttee and others, (Defendants,) *Respondents.*

Baboo Dwarkanath Mitter and Moonshee Ameer Alee, for Appellants.

Baboo Kishenkishore Ghose and Jugudanund Mookerjee, for Respondents.

Suit laid at Rupees 5229-15-7.

PLAINTIFFS, Prankishen Dhur and others, sue Kishenchunder Chuckerbuttee and others for the recovery of the principal and interest due on a written order of Beebee Razeeoonissa, dated 30th Assin 1248 B. E.

Plaintiffs allege that Beebee Razeeoonissa, zemindar of tuppah Mohamedabad, during her life time, on 30th Assar 1248 B. S., had farmed out to their deceased father, Suttroghun Dhur, hoodah Moheshbattee, appertaining to the above-named tuppah, for the term of nine years, from 1248 to 1258 B. S. inclusive, at an annual rental of rs. 472; that the farm was let to him on his personal security in the name of Roopnarain Dey, in whose favor the aforesaid Razeeoonissa executed a roka, authorising him, with a view of liquidating a debt due to him, to deduct from the rent payable to her rs. 467

Held, that when a lease is granted benamed to a person, and a separate deed of assignment to him of a great portion of the rent payable to the zemindar is executed at the same time, the transaction, though contained on two different documents, must be considered as one transaction: and that, in any suit brought by the zemindar or his representatives against the lessee, the whole transaction must be pleaded, and if, from any cause, that may not be done, the lessee has no separate action for remedying the effect of his own negligence, but must suffer the penalty of his own laches.

Case dismissed, and decision of lower court affirmed.

annually, from 1248 to 1255, and rs. 87 in 1256; that, in conformity with the conditions of the written order, he held possession of the mehal, deducting his own due from the amount of rent, and paying the balance to the zemindar, as provided for in the roka; that, in 1251 B. S., plaintiffs' father having demised, they succeeded him in the possession, deducting, as he had done, their due, and paying the balance to the zemindar; that, subsequently, Kistochunder Chuckerbuttee, defendant, declaring himself to be the putneedar of the entire tuppa Mohamedabad from Beebee Razeeoonissa, in 1250 B. E. preferred a suit against them and Roopnarain Dey, the nominal farmer, for the whole rent as by engagement, viz. rs. 472, for five years, from 1250 to 1254, altogether for rs. 2360 principal, with rs. 801 interest, amounting to rs. 3161; that plaintiffs entered an appearance and pleaded that they have succeeded to their father's benamee ijara, and were entitled to be maintained in possession of it by payment to the putneedar of the rental, less the amount assigned by the proprietor for the liquidation of her debt to their father under the written order; and that the putneedar was not warranted in attempting to set aside an engagement concluded by the zemindar; that the said plea was established to the satisfaction of the late principal sudder ameen, and a decree was passed on the 9th February 1850 for the arrears due, less the amount assigned for the payment of the zemindar's debt; that the putneedar having appealed, the case was remanded for re-investigation, and, on having been taken up by the officiating principal sudder ameen, that officer, on the ground that the roka was on a stamp of rs. 4, and should have been on one of rs. 20, refused to look at it, and gave the putneedar a decree for the amount claimed, without allowing the set-off pleaded by them; that this order, on appeal by plaintiffs, was affirmed by the judge on the 16th May 1853; that, having now had a proper stamp affixed to the roka, they institute a suit against the putneedar, who is in the place of the zemindar, for the amount due under the roka, with interest, altogether for rs. 5229-15-7, for which no set-off was allowed in the former suit, making, at the same time, the heir of the zemindar and his guardian and others *pro forma* defendants.

The defendant Kistochunder Chuckerbuttee, in his answer, pleads that he had no notice that the deceased, Beebee Razeeoonissa, had granted the farm, or that the written order had been executed by the lessor; that, subsequent to the granting of the farm by the deceased, Razeeoonissa, to plaintiffs' ancestor, all her rights and interests in tuppa Mohamedabad were let in putnee to him, in which lease no mention, either of the farming lease or the alleged roka, is made; that, after obtaining possession of the putnee talook, the defendant discovered that mehal Moheshbattee was in possession of Suttroghun Dhur, deceased; that, having demanded rent to

no effect, defendant sued plaintiffs for rent, in which suit they pleaded the farm and the roka ; that, in consequence of the roka not being stamped and the deed an invalid one, defendant obtained a decree in conformity with his claim ; that plaintiffs cannot now, under the invalidity of that document, sue defendant, but must suffer any loss caused by their own folly, or, if that document be genuine, they may have an action against the party executing the same ; that, moreover, the deed itself is spurious, as may be gathered both by the deed itself and the circumstances under which it was alleged to have been executed ; that, consequently, plaintiffs' suit must be dismissed.

The *pro forma* defendants did not enter an appearance.

The principal sudder ameen was of opinion that, agreeably to the spirit of Sections XII. and XVI. Regulation III. of 1793, plaintiffs' present suit will not lie, for, under those Sections the courts are prohibited from receiving and trying the merits of a case between the same parties, which has been previously heard and decided in a suit between the present plaintiffs, as defendants, and the defendant Kistochunder Chuckerbuttee, the putneedar, as plaintiff. As then the present plaintiffs' plea of assignment of rents to them had been rejected in consequence of the insufficiency of the stamp paper, on which the roka was engrossed, it is not competent to them again to institute a suit against the putneedar, founded on the very same document ; and, although the precedent of this Court, dated 27th July 1855, has been cited by the vakeel of the plaintiffs as conclusive proof of the admissibility of the present suit, still, as the words of that decision are in themselves not clear, they cannot be considered as contravening the fundamental principle of Sections XII. and XVI. of Regulation III. of 1793. Whether the plaintiffs could or could not, on the deed of assignment, sue the heirs of Razeeoonissa, the principal sudder ameen considers it unnecessary for him to determine in the present suit, seeing that those parties were only *pro forma* defendants. The principal sudder ameen concluded by dismissing the plaintiffs' suit.

JUDGMENT.

From the judgment passed adversely to him by the lower court, the plaintiffs have now appealed to this Court, urging the inapplicability of either Section XII. or Section XVI. of Regulation III. of 1793 to the present suit, now before the Court.

On the main facts of the case there is no contention. The ancestress of certain of the defendants *pro forma*, Razeeoonissa, became indebted to the father of the plaintiffs, appellants, Suttroghun Dhur. On the 30th Assin 1248 she leased out to him in farm for nine years, *viz.* from 1248 to 1258 inclusive, on his personal security, in the name of his servant, Roopnarain Dey, a mehal named hoodah Moheshbattee,

situated within her zemindaree, at a yearly rent of rs. 472. At the same time she executed a roka, or written order, authorising the nominal farmer, with a view of liquidating the debt due by her to Suttroghun Dhur, to deduct from the rents payable to her, annually rs. 467 from 1248 to 1255, and rs. 87 in 1256, and to pay the same to Suttroghun Dhur, and to pay the balance to her. The deeds were, in due course, acted upon. In 1250, however, the defendant Kishtochunder Chuckerbuttee took a putnee lease of tuppa Mohamedabad from the zemindar Razeeoonissa; and not having received the rents of the farm from 1250 to 1254, he sued the farmer for the same. The present plaintiffs, their father having previously demised, pleaded the deed of assignment or roka; but as it was on insufficient stamp, the court refused to listen to the pleas, and gave a decree in full to the putneedar. The farmers now, having had a stamp of sufficient value affixed to the roka, sue the putneedar for the amount, unjustly recovered from them in the former action, and due to them under the roka, with interest on the same.

It is on these facts contended on behalf of the plaintiffs by the junior Government pleader, that the putneedar is in exactly the same position as the zemindar was before she granted the putnee lease, and, as was ruled in the case of Ryechand Roy Chowdhree *versus* Mr. Carnegie and Radhamadhub Roy, a case like the present, decided on the 17th June 1858, is only entitled to receive what the zemindar would have received, had she continued in possession; that, therefore, the amount received by the putneedar which, under the deed of assignment, should have been paid to plaintiffs, has been paid away by mistake; and for the wrong which they have thereby suffered, the plaintiffs are entitled to bring the present action, as was ruled in an analogous case with the present, decided on the 26th May 1858, that of Syud Abdool Hossein *versus* Baboo Modenarain Singh; that Section XVI. of Regulation III. of 1793 has nothing to do with the present suit, for, as the roka was not stamped, so much of the pleading as refers to it could not be listened to; that, consequently, the answer in the former case is as if the deed of assignment were never attended to in that case, and Section XVI. cannot have any thing to do with the matter; that, under the ruling of this Court, in the case of Brijonundun Dass *versus* Kishendeonarain Singh and others, decided on the 21st September last, the lease and the roka, though forming two deeds, contain only one transaction; that, consequently, notwithstanding the omission to plead effectually the roka in the former case, there is no reason why the plaintiffs should not now sue the putneedar, who stands in the place of the zemindar equally *as to the lease and the roka*, for the money had and received by him to plaintiffs' use; that, consequently, the order of the principal sudder ameen should be reversed, and the suit remanded for investigation on the merits.

On the part of the defendant it is contended that the suit is clearly barred by Section XVI. of Regulation III. of 1793, and, moreover, that the plea of the roka was in the former case rejected as based on insufficient evidence; if, therefore, the court listens to the case, it will be tantamount to ruling that, in all suits dismissed for insufficient evidence, a fresh suit may be instituted if the parties think that, from full evidence acquired, it is advisable so to act; that such a course would not only be inexpedient, but clearly illegal, and, consequently, the present suit should not be admitted, but the order of the principal sudder ameen should be affirmed.

We think that Section XVI. Regulation III. of 1793 will not apply to the present action. The majority of this court, in the case of Taramonee Debea *versus* Rajender Chatterjee, on the 17th September 1850, ruled that a deed unstamped or not bearing the proper stamp when a suit is brought, cannot be admitted as the foundation of that suit at any stage, since Section III. Regulation X. of 1829 distinctly lays down that no such deed shall ever be *pleaded* in any court of judicature; and, consequently, a suit originally resting on such a document must, necessarily, be dismissed, as being declared wholly bad and incapable of reception *ab initio* by the positive terms of the law. Now, by parity of reasoning, so much of any answer as rests upon a document of this nature is incapable of reception, and is as if the matter regarding it had never been pleaded at all. It follows, therefore, that the roka now propounded by the plaintiffs must be considered never to have been before the court in the previous case, and not, as pleaded by the defendant, respondent, to be rejected as based on insufficient evidence; and if so, the subject matter of this suit is not identical with that of the other, and Section XVI. will not apply, whatever other objections there may be to the suit in its present form.

Looking to the facts of the case, we have no doubt whatever that, if the two deeds, the lease and the roka, had been both pleaded by the plaintiffs as defendants in the original suit, they must, as was ruled by the Court in a case* in its circumstances like the present, cited by the pleader for the appellant, decided on the 20th September last, have been considered as constituting *one transaction*, and, consequently, that the putneedar would have been determined to be entitled only to receive that to which the zemindar would have been entitled, had she retained the estate in her own hands; but the transaction being one, and that portion of it referring to the assignment not having been pleaded, the question arises, whether such failure, on the part of the present plaintiffs in that case, in which the putneedar sued them for the rent due on their farming lease, and as *bond fide* putneedar, without notice of the

* See Decisions of 1858, pages 1529—1531.

assignment, does not deprive them of all present remedy against the putneedar, and throw the plaintiffs back upon any remedy which they may have against the heirs of the original debtor, Razeeoonissa.

After the best consideration we have been able to give to the subject, we have come to the conclusion that the plaintiffs, by their negligence in the former suit, have debarred themselves from suing the putneedar in the present. We think that on principle it was incumbent on the plaintiffs in this suit, when sued by the putneedar, representing the zemindar, for rents, to set forth *the whole claim* which they had against her. This, undoubtedly, they intended to do, but the result has been that so much of the pleading as refers to the deed of assignment must be considered as if it had never been, and their whole case was in effect not pleaded. This result has arisen, not from any act of the court, but from their own negligence alone, and it follows that they must suffer the penalty of that negligence, and cannot now, in a fresh suit, revive a *portion of one entire transaction, which they should then in its entirety, in the pleading, have placed before the court.*

This case is, in its facts, dissimilar from that decided by this Court on the 26th May last, one of mere set-off. In that case, it was not *incumbent* upon the obligor to plead the payments under the bond, and not having done so in effect, and a decree in full having been obtained by the obligee under the bond, the Court ruled whether rightly or wrongly that the obligor might have an action for the sum which he alleged that he had paid to the obligee, for which, in consequence of the decree, he had received no consideration; and in that decided by the Court on the 27th July 1853, alluded to by the principal sudder ameen, the decree being passed as it were *ex-parte*, the opposite party was declared at liberty hereafter, if so advised, after having his document duly stamped, to sue, with a view to establish the same. But in this case it is necessary that the *whole transaction*, as between the zemindar, representing the putneedar, and the farmers, and not a part of it, should have been placed before the court; and if by the *laches* of the farmers the transaction in its totality was not so placed before the Court, the farmers must, as above shown, suffer for their negligence.

Although, therefore, we differ from the principal sudder ameen as to the strict applicability of Section XVI. of Regulation III. of 1793 to the case before us, still, as we, for other reasons, think that the suit will not lie as against the putneedar, we affirm the decision of the lower court, with costs.

Whether or not the plaintiffs have any remedy against the original debtor for the amount of the debt due, it is unnecessary for us to determine in this suit, her heirs having only been made *pro forma* defendants in the present action.

THE 30TH MAY 1859.

H. T. RAIKES, ESQ., Judge, and G. LOCH and H. V. BAYLEY, ESQS.,
Officiating Judges.

Case No. 219 of 1855.

Regular Appeal from the decision of Baboo Tarakant Bidyasagur, Principal Sudder Ameen of Cuttack, dated 9th May 1855.

Nursingh Koontya, (one of the Defendants,) *Appellant,*
versus

Rama Bye and Bhugeeruthee Dasse, (Plaintiffs,) and others,
(Defendants,) *Respondents.*

Mr. J. W. B. Money, Baboo Kishenkishore Ghose, and Moulvee Aftaboodeen Mahomed, for Appellant.

Moulvee Murhumut Hossein and Baboo Kishensukha Mookerjee, for Respondents.

Suit laid at Rupees 17,809-10a-1c-1k.

THIS case was decided on the 17th June 1857, and has now come up for re-hearing, the judges who first heard and decided it having, on the 30th November 1857, granted a re-trial.

The appellant had represented to the Court that he was in possession of part of the property in suit under a deed of mortgage granted by Mussumat Rebuttee, the widow of Guddadhur, who had, in the first instance, claimed to succeed his father Ramkishen, as alone entitled to hold this estate; but the Court, having refused to acknowledge the sole title of Guddadhur, declared the estates of Ramkishen to have descended to his four sons, and would not, therefore, recognise any lien on the property created by Guddadhur's widow to the injury of the other brothers. Appellant then applied for a review of that judgment, representing to the Court that, although the mortgage to himself was ostensibly the creation of Rebuttee, it was, in reality, a renewal of security in that form, originally granted by Ramkishen, the common ancestor, for debts contracted by him; and as appellant had advanced money to enable Rebuttee to discharge those debts, the mortgage made by her in his favor was merely a renewal of the former security for his advantage; he therefore argued that he had a right to keep possession of the property mortgaged until his advances were discharged by those now entitled to the property as representing the heirs of Ramkishen. As mention was made in the lower court's decree of a mortgage having been effected by Ramkishen, the pleader of appellant, when applying for review of judgment, referred to this, and assumed this to be the mortgage, the liabilities of which his client had discharged; and on the presumption that this fact had

On review of judgment, former decision maintained, in the absence of proof that the mortgage deed to appellant was executed in satisfaction of another person's debts.

been overlooked, the review was granted to try if this connection between appellant's mortgage and previous one could be established by the record. This point, therefore, has had our attention on the present trial.

The pleader of appellant, however, has not been able to show us that the record contains any proof to establish that the mortgage executed by Mussumat Rebuttee was ever intended to clear off and take the place of a mortgage created by Ramkishen.

All he can show us is a petition to the judge from Rebuttee, stating that she had sold 8 annas of the property, and had also mortgaged the remaining moiety, and had paid off debts due to creditors. But there is no documentary evidence to show that the mortgage to appellant was executed in satisfaction of the debts of Ramkishen: on the contrary, a decree of the principal sudder ameen, of the 24th December 1847, states that the sale price of the 8 annas was so appropriated.

We, therefore, see no reason to alter the decree originally passed in this case on the 17th June 1857, and confirm it accordingly, dismissing this appeal, with costs.

THE 30TH MAY 1859.

H. T. RAIKES, Esq., Judge, and G. LOCH and H. V. BAYLEY, Esqs.,
Officiating Judges.

Regular Appeals from the decision of Baboo Woopendurchunder Nyaruttun, Principal Sudder Ameen of Jessore, dated 28th November 1856.

Case No. 41 of 1857.

Moulvee Salamut Alee, (Plaintiff,) *Appellant*,
versus

Gopeekishen Bose and others, (Defendants,) *Respondents*.
Baboo Shrubhhoonath Pundit and Moonshee Ameer Alee, for Appellant.
Baboo Gobindchunder Mookerjee, for Respondents.

Case No. 931 of 1857.

Shunkursun Bose and others, (Defendants,) *Appellants*,
versus
Moulvee Salamut Alee, (Plaintiff,) and others, Defendants, *Respondents*.

Baboo Govindchunder Mookerjee, for Appellants.
Moonshee Ameer Alee, for Respondents.

Suit laid at Rupees 8760-2a.-5p.-2c.-2k.

Suit remanded, that the issue regarding the PLAINTIFF, on the 24th August 1842, obtained a decree in the principal sudder ameen's court, for arrears of rent on a jote in the

name of Radhamohun *alias* Ramneedhee, against Sindheamonee, widow of the said Radhamohun, and against Russiklall, Hurrolall, and Nundlall Dutt. In execution plaintiff attached a talook mouzah Parala, in pergunnah Salamabad, recorded in the name of Radhamohun, and the sole property of Sindheamonee, and caused it to be sold on the 5th January 1847, and purchased it himself. Proclamation awarding possession to the plaintiff was issued on 20th Bysakh 1254 (2nd May 1847); but, owing to the opposition made by the judgment debtors, he was unable to obtain possession, and Sindheamonee continued in the enjoyment of the talook. The said talook was alleged by plaintiff to be the sole property of Radhamohun, and had come into the possession of Sindheamonee on his death. The other defendants had attempted to establish their claim to a share in the property, and had obtained the registration of their names in the collector's books; but a suit to erase their names and to declare her sole proprietor of the talook having been instituted by Sindheamonee, she obtained a decree in February 1838. When, however, the plaintiff brought his suit for arrears of rent, Sindheamonee, in collusion with the other defendants, executed an ikrar-namah, dated 15th Bhadro 1249, in which she stated that her share in the property was only 2 annas, and that the remaining 14 annas belonged to Russiklall Dutt and others; and that they, in 1241, had given a putnee of the talook to Baneemadhub Roy, which she then ratified. Owing to this collusion among the defendants, the plaintiff was unable to get possession of the talook, and he therefore brought this action to obtain possession, with mesne profits, and to set aside the fraudulent putnee lease.

The defendants Russiklall Dutt and others state that the talook Parala was the joint property of their father Ram Dass and his brother, Radhamohun *alias* Ramneedhee, the husband of Sindheamonee; that as Ramneedhee was the elder brother, his name was recorded as proprietor in the collector's books; that, on the death of their father, they held in coparceny with their uncle Radhamohun, and, on occasion of differences arising with him, had their names recorded as joint proprietors with him; that, on his death without male issue, they succeeded to the deceased's estate, of which it was agreed that his widow Sindheamonee should receive a 2 annas share and maintenance, unless a posthumous son should be born, when some other arrangement would be necessary; that, owing to debts incurred at various periods, and to save the estate from a mortgagee who had foreclosed, they gave a putnee lease to Dabee Koonwur Bose, in the name of his brother Baneemadhub, on 5th Srabun 1241, receiving rs. 5500 as consideration, of which rs. 687-8 were paid to Sindheamonee, and that, on the receipt of a

share of the judgment debtor in an estate purchased by plaintiff may be determined. A finding on the above issue being necessary to determine whether a putnee of the said estate, granted by the said judgment debtor and other defendants to another set of defendants, is collusive or otherwise.

further sum of rs. 851, Sindheamonee and the defendant executed a further ikrar on 15th Bhadro 1249, in favor of the putneedar, in which the shares of Sindheamonee, viz. 2 annas, and of the other defendants, were specified; that, in order to evade their creditors, they caused a suit to be brought against themselves in Sindheamonee's name to reverse the collector's order for registration; that an *ex-parte* decree was passed with their connivance, but no judgment was passed in that case as to the rights of parties, and the defendants are not prejudiced thereby. The defendant Hurrolall adds, that he and Sindheamonee had sold their rights and interests in the talook to Bilmonee Ghose, who had given a lease of the same to the defendant Russiklall.

Shunkursun Bose and the other defendants plead that they obtained a putnee lease from Russiklall, Hurrolall, and Nundlall Dutt in 1241, they being at the time in possession of the talook, and that Sindheamonee, who had only a 2-anna share in the property, subsequently, by an ikrar, dated 15th Bhadro 1249, confirmed the putnee lease; that plaintiff, being the auction purchaser, was only entitled to the rights and interests of the judgment debtor; and, further, that, whether the date on which the putnee lease was given, viz. Srabun 1241, or that on which the ikrar was signed by Sindheamonee, viz. 15th Bhadro 1249, he adopted, from either date more than twelve years have elapsed, and, therefore, the defendants' possession cannot be disturbed nor their rights interfered with.

The principal sudder ameen has found that a putnee of the whole talook was given by the defendants Russiklall, Sindheamonee, and others, to Dabee Koonwur Bose, now represented by the defendants Shunkursun Bose and others; and, consequently, the plaintiff's claim to obtain actual possession and to collect rents direct from the ryots by annulment of the putnee settlement, is not tenable, and he, therefore, dismissed the suit, with costs.

Two appeals have been preferred from this decision, one by the plaintiff, the other as a precautionary measure by the defendant putneedars, who plead the statute of limitations as barring the suit against them. As, however, their right is not adverse, but subordinate to the plaintiff's right, and the averment on his part is that the putnee lease is merely collusive, and has not been really acted upon, we do not think the decision of the 19th June 1858, page 1158, quoted by the counsel for the defendants, appellants, applicable, or that the hearing of this suit is barred by limitation. If the putnee lease be *bond fide*, the plaintiff will only be entitled to such rights as the judgment debtor enjoyed at the time these were purchased by him. To determine, however, whether the putnee be valid, it is necessary first to ascertain what is the right of Mussumat Sindheamonee,

whether she is entitled to the whole of the talook as alleged by the plaintiff, or to a 2-anna share only, as asserted by the defendant, and set forth in his ikrar of 1249; but this point the lower court has left undetermined, though it was the first issue fixed by the principal sudder ameen as necessary for determination, and it is argued by the plaintiff, appellant, unless this be clearly ascertained, the real nature of the transaction between the judgment debtors and the one set of defendants with the other set of defendants regarding the putnee cannot be discovered. We, therefore, remand the case to the principal sudder ameen for a distinct finding on the point above indicated; and having ascertained what is the share of Sindheamonee, the principal sudder ameen will then determine whether the putnee lease is a collusive transaction and never acted upon, or a transaction in good faith, and dispose of the case accordingly, which, as it is of old standing, he will take up out of its turn.

THE 30TH MAY 1859.

H. T. RAIKES, Esq., Judge, and G. LOCH and H. V. BAYLEY, Esqs.,
Officiating Judges.

Case No. 127 of 1853.

*Regular Appeal from the decision of Mr. Alexander Davidson,
Principal Sudder Ameen of Midnapore, dated 21st May 1851.*

Gunganarain Pal, (Pauper Plaintiff,) Appellant,
versus

Kishenmohun Pal, (Defendant,) Respondent.

*Moonshee Ameer Alee and Moulvees Aftaboodeen and Syud
Murhumut Hossein, for Appellants.*

*Baboo Kishenkishore Ghose and Jugudanund Mookerjee, for
Respondents.*

THIS suit is brought for possession of a share of talook tuppah Durundah and of rent-free land therein and mesne profits, and is laid at rs. 23,686-7a.-15g. Plaintiff sued for a share of ancestral property on a right by inheritance; and defendant pleaded that the whole property devolved on him by right of primogeniture, according to family custom.

The plaintiff alleges a right by inheritance to the ancestral property involved in this suit. Defendant pleads that, by the family custom or *koolachar*, the property devolves on him as eldest son, and that the plaintiff is entitled only to a maintenance, which he duly receives. Held that, as plaintiff pleaded long possession, under his right of inheritance, and disposses-

It would appear that the common ancestor of the parties was one Ramnarain Pal, who had three sons, Mothoormohun the original defendant, Gunganarain the plaintiff, and Bistoochurree, who died without issue. There is no dispute that the estate was sold for arrears of revenue, and that about 1803 A. D., the property now

sion, he should first prove these pleas; but as plaintiff in no way proved these points, plaintiff's (appellant's) appeal was dismissed.

in suit was settled with Ramnarain Pal, who remained the recorded proprietor till 1817 A. D., when he died. The plaintiff distinctly avers that, from that time till the 27th May 1839, he held *joint possession of the property*. He states that, on the 30th September 1821, defendant endeavored to have his sole name registered as proprietor by the Collector; that he, plaintiff, on the 9th July 1836, petitioned the Collector to have his name entered as joint proprietor; that this was done by an order of the Assistant Collector on the 30th September 1836, which, however, was reversed by the Collector on the 27th May 1839, who recorded defendant as sole proprietor; and that thereupon defendant ousted plaintiff. Plaintiff adds, that the ryots of three villages, knowing plaintiff's right to the whole, paid to plaintiff the whole rent of those villages. This plaint was filed on the 19th December 1848.

Defendant, as before observed, alleges a right of primogeniture according to family custom, and denies that plaintiff had in any way whatever held the joint possession he averred he had. Defendant urges that plaintiff does not allege that the property was not held by their father alone, in accordance with the family custom, for several generations; that, under this custom, the younger sons had received lands in jageer and rent-free, in lieu of money allowance and of pensions for their maintenance; and that the defendant's father, in his old age, publicly recognised defendant as the heir to his property by right of primogeniture. Defendant adds, that, in 1819, plaintiff separated from the commensality which had before that existed, and received three villages and certain rent-free lands for his separate maintenance. In regard to registration by the Collector, defendant states that, on his petition of the 30th September 1821, orders were passed, inviting objectors to appear within a month, and that none appeared then; but in 1836 plaintiff applied for registration, and his claim, though admitted by the Assistant Collector, was finally rejected by the Collector, and that a suit, brought by plaintiff to set aside that order of the Collector, was dismissed on the 28th November 1839. Defendant pleads the law of limitation as barring plaintiff's suit, and declares plaintiff unable to show his possession or dispossession from any joint share in any way whatsoever, while every invoice of payment of revenue and every lease and contract and claim for rent is in defendant's name.

The principal sudder ameen held that there was nothing to show that plaintiff ever exercised a single proprietary right or was ever dispossessed, while, on the other hand, defendant proved that the zemindaree was never divided or joint. The principal sudder ameen, therefore, dismissed plaintiff's claim, considering him entitled to receive maintenance only.

Plaintiff appeals from this decision, and his first plea is, that, as the defendant has relied on the special plea of family custom to

support his alleged right by primogeniture, it is for him to prove that, and also the averment made of the cessation of commensality, and the acceptance by defendant of maintenance in 1819 A. D.

Had plaintiff's pleading only been for possession under the ordinary law of inheritance, we should have thought it necessary to call upon the defendant to prove his special plea of primogeniture; but, as plaintiff pleads long possession and subsequent dispossession by defendant, we think that, before going into the defendant's case, the plaintiff must give some proof of his having been in possession. Thus, in this case, plaintiff should come into court with the support of some *prima facie* evidence to bear out his allegation. But his pleadings and list of papers indicate merely some oral testimony and the registration of his name by the Assistant Collector in 1836, which, as the principal sudder ameen observes, is worthless, as the Assistant's order was reversed by the Collector in 1839, and that last order has not been set aside by any regular suit.

We, therefore, consider it necessary that the plaintiff should show some ground for his averment of his long joint possession and dispossession under the Collector's order of 1839, before the defendant is called on to plead. The very nature of the averment shows that the ordinary proof adducible in such cases would not be wanting to the plaintiff, had he really been in joint possession, such as joint receipts for payment of money, collection papers, leases and their counterparts, and ordinary accounts debiting and crediting the profits and losses of the joint property to the parties concerned, and plaintiff's own accounts corresponding therewith as regarded his own share. But nothing whatever is adduced before us, save the oral testimony of three or four witnesses.

We do not, therefore, think plaintiff has shown any thing to support his case, or to require defendant to go into proof to rebut the claim; and we dismiss the appeal, with costs on appellant.

THE 30TH MAY 1859.

J. H. PATTON and E. A. SAMUELLS, Esqs., Judges.

Petition No. 2041 of 1858.

Application for the admission of a Special Appeal from the decision of Major John Butter, Deputy Commissioner of Assam, dated 25th September 1858, reversing that of Cazee Gholam Hukkanee, Principal Sudder Ameen of Gowalpara, dated 30th November 1857, in the case of

Pertapchunder Burrowa, (*Plaintiff,*) Petitioner,
versus

Koroonamoyee Debea and others, (*Defendants,*) Opposite Party.

Baboos Ashootosh Chatterjee and Unookoolchunder Mookerjee, for
Petitioner.

Baboos Beneemadhub Banerjee and Unnodapersad Banerjee, for
the Opposite Party.

Authority having been given by the Sudder Court to a particular zillah court to try a cause respecting landed property, alleged by one party to be in one district, and by the other in another, no question of jurisdiction can arise, and lower court ought not to dismiss suit on the ground that the property appears, by thakbust map, to be in another district.

It is hereby certified that the said application is granted on the following grounds.

The plaintiff, special petitioner, sued for a julkur which he alleged to be situated in the district of Gowalpara. The deputy commissioner nonsuited him, on the ground that the julkur was on the boundary of the Rungpore district, and the permission of the Sudder Court was necessary to enable the principal sudder ameen to try the case. The principal sudder ameen then applied to this Court, and obtained an order for the trial of the case in Gowalpara. He accordingly tried it, and gave plaintiff a decree. On appeal, the deputy commissioner dismissed the suit, on the ground that the thakbust map shows the julkur to be within the limits of Rungpore. This was clearly improper. After the Sudder Court had given the Gowalpara courts jurisdiction in the cause, the locality of the julkur could not affect that question, and ought not to have been mooted by the deputy commissioner. The thakbust map also, we observe, was drawn out two years subsequent to the commencement of this dispute, and cannot therefore be said to be evidence in the case.

We remand the case to the deputy commissioner, with instructions to dispose of the appeal on its merits.

THE 31ST MAY 1859.

II. T. RAIKES, ESQ., Judge, and G. LOCH and H. V. BAYLEY, ESQS.,
Officiating Judges.

Case No. 611 of 1858.

Special Appeal from the decision of Mr. M. A. Shawe, Judge of Sylhet, dated 31st March 1858, reversing a decree of Baboo Hurgouree Bose, Moonsiff of Russoolgunge, dated 3rd November 1857.

Meheroollah *alias* Meheroodeen, (Plaintiff,) *Appellant,*
versus

Guffur Beebee and others, (Defendants,) *Respondents.*

Moulvee Mahomed Ismail, for Appellant, Ex-parte.

THIS case was admitted to special appeal on the 23rd September 1858, under the following certificate recorded by Messrs. C. B. Trevor and H. V. Bayley.

"Plaintiff, special appellant, instituted a suit against the defendants for possession of certain property, which, on proceeding to Mymensing on service, he had first on the 22nd Pous 1244 B. S. entrusted to their care, and which they refused to deliver up to him on the 1st Assin 1263. Defendants pleaded that plaintiff had relinquished his property.

"The moonsiff decided in favor of plaintiff. The judge writes as follows: 'The plaintiff's own statements show that he was out of possession of the land in question since the 22nd Pous 1244 B. S. The statute of limitations does apply to this suit. I, therefore, reverse the moonsiff's decision, and dismiss the plaintiff's (respondent's) claim, all costs to be borne by the plaintiff.'

"Plaintiff has now appealed specially, urging that the judge has entirely misunderstood his claim, which was, that the defendants were trustees for him from 1244 to 1263, and only set up an adverse title to him on the 1st Assin 1263.

"We think that the judge's decision cannot stand. Plaintiff alleges that the defendants were his trustees and only set up a title adverse to him in Assin 1263. Defendants aver that plaintiff relinquished possession, which they do not distinctly state.

"It is clear upon those pleadings that, if plaintiff is able to prove that they were his trustees, and defendants are unable to prove the abandonment by plaintiff of his right by some clear act more than twelve years before the institution of this suit, the statute of limitations will not apply at all. To apply it, as the judge has done, to plaintiff's own statement, is clearly wrong. We, therefore, admit the appeal, to try whether the suit should not be remanded for reinvestigation to the judge."

Case remanded for determination of the points raised on the certificate. Plaintiffs sued for possession of certain property, stating that the defendants were his trustees. Defendants pleaded that plaintiff had given up the property.

The judge, on appeal, moved the decision of the lower court, holding the suit to be barred by the statute of limitations. The judge should have ascertained whether plaintiff's allegation were true or not for, if defendant held as trustees for plaintiff, his suit is not barred.

JUDGMENT.

The respondents have not appeared in this case, but we think it should be remanded for the reasons given in the certificate for trial of the points therein noted.

THE 31ST MAY 1859.

H. T. RAIKES, Esq., Judge, and G. LOCH and H. V. BAYLEY, Esqs.,
Officiating Judges.

Case No. 765 of 1858.

Special Appeal from the decision of Moulvee Mahomed Nazim Khan, Principal Sudder Ameen of Dacca, dated 10th May 1858, reversing a decree of Baboo Nittanund Gangoollee, Acting Additional Moonsiff of that district, dated 27th June 1857.

Mr. G. Lamb, (Plaintiff,) *Appellant,*
versus

Lushkur Mahomed and others, (Defendants,) *Respondents.*

Baboo Kiskensukha Mookerjee, for Appellant.

Moulvee Mahomed Iemal, for Respondents.

As one of the defendants confessed judgment as to her share of the debt sued for, the lower appellate court should not have released her from the decree. Moonsiff's order upheld.

THIS case was admitted to special appeal on the 16th December 1858, under the following certificate recorded by Messrs. A. Sconce and H. V. Bayley.

"Plaintiff, petitioner, appeals specially against the judgment of the principal sudder ameen in this case. Plaintiff sued in the moonsiff's court against Zeman Beebee and seven others, on a joint-bond. In that suit Zeman Beebee admitted her liability under the bond to the extent of rs. 15, *i. e.* her deceased husband's share of the amount of a fine paid by plaintiff on account of the parties who were alleged to have executed the bond.

"The principal sudder ameen held, on appeal, that the bond was not duly attested and that no consideration had passed. The principal sudder ameen dismissed the plaintiff's suit as against *all* the defendants. But the defendant Zeman Beebee had admitted her liability under the bond before the moonsiff, and had not appealed with the other defendants to the principal sudder ameen.

"The plaintiff, special appellant, consequently, contends the moonsiff's judgment must be held good against her, and that the principal sudder ameen should not have dismissed plaintiff's suit as against her.

"We admit the special appeal to try this point."

JUDGMENT.

No one has appeared on the part of Zeman Beebee, but on the part of the other respondents a pleader has attended. They are not

however affected by the question raised in this certificate, which is merely whether or not the judgment of the moonsiff shall be upheld on the admissions of that party before that court.

We find that the moonsiff decreed the special appellant's claim for the share of the debt due from her husband on her confessing judgment ; and as she has not questioned that order by appealing from it, the principal sudder ameen would not release her from the decree, which declares the property of her deceased husband liable to the extent indicated.

We, therefore, reverse the lower appellate court's order, and uphold the moonsiff's decision against the property of Zeman Beebee's husband. The costs of those respondents who have appeared will be defrayed by the special appellant, as they were not necessary parties to this appeal.

THE 31ST MAY 1859.

C. B. TREVOR and E. A. SAMUELLS, ESQs., Judges, and G. LOCH, ESQ.,
Officiating Judge.

Regular Appeals from the decision of Baboo Oopendurchunder Nyaruttun, Principal Sudder Ameen of Jessore, dated 11th May 1857.

Case No. 649 of 1857.

Radhika Chowdhraïn, (Plaintiff,) *Appellant,*
versus

Bholanath Ghose and others, (Defendants,) *Respondents.*

Appeal valued at Rupees 5621-2-5.

Baboos Jugudanund Mookerjee and Kishenkishore Ghose, for Appellant.

Baboo Baneemadhub Banerjee and Mr. R. T. Allan, for Respondents.

Case No. 650 of 1857.

Kaleepersad Ghose and others, (Defendants,) *Appellants,*
versus

Radhika Chowdhraïn, (Plaintiff,) *Respondent.*

Appeal valued at Rupees 730-15-9.

Baboos Unnodapersad Banerjee and Baneemadhub Banerjee, and Mr. R. T. Allan, for Appellants.

Baboos Jugudanund Mookerjee and Kishenkishore Ghose, for Respondents.

THE plaintiff in this suit is the wife of Tarapersad Chowdhree. In a suit for
She states that she purchased 6 annas of kismut pergunnah Hooglah enhancement of
rent, held, in

accordance with previous decision, that Section LI. Regulation VIII. of 1793 refers to the talookdars mentioned in Sec. XLVIII, whose engagements with the zemindars were recorded at the time of the perpetual settlement; and that the onus of proving exemption from enhancement of rent is on the party claiming exemption. Plaintiff entitled to enhanced rates, with interest, from date of notice, defendants not having contested plaintiff's rates, and having raised objections to the general right to enhance, which they had failed to establish.

from her husband with funds derived from her stridhūn, in the year 1247; that, on 2nd Bysakh 1253, she served the defendants Kaleepersad Ghose and others, who held a talook called Dyapara, within the said kismut, with notice to pay rent on 2455 beegahs 4 cottahs, which she had ascertained to be comprised within the talook, at the pergunnah rates, which amounted in the aggregate to 5333-9-2, but as they have failed to appear or come to any arrangement, she has been obliged to institute this suit for enhancement of assessment, making the 10 annas shareholder of the zemindaree, Doorgapersad Chowdhree, a nominal defendant, in consequence of his refusing to join her in the suit.

The defendants Kaleepersad Ghose and others deny that the plaintiff has any right to enhance their rent. They allege that, previous to the decennial settlement, the proprietor of the pergunnah created this talook in favor of Jan Mamood, who held it in the name of his son Buxoo Mamood; that, in 1198, the zemindar executed a settlement paper, called a *bundobust furd*, which he delivered to the talookdar, fixing his rent at rs. 169-11-14-1, and stating that the talook might be separated from the zemindaree, if desired; that in 1213 defendants purchased half of this talook from Buxoo Mamood (acquiring the other half at a subsequent period), and, in consequence of the zemindar having first refused to register the sale, and afterwards ousted them, brought a suit against him, which was decided by the cazee on the 3rd August 1810 in their favor, the zemindar being ordered to register their names and to receive rent from them according to the *bundobust furd*; that, accordingly, in the year 1222, the zemindar registered their names and gave them a *kharijnama*; that they had continued ever since to pay rent at the same rate which had been fixed prior to the decennial settlement, and, consequently, were not liable to enhancement. They denied the service of notice alleged by the plaintiff, and disputed in general terms the correctness of her estimate of the area of their talook, but they did not take objection to her rates of assessment.

On the 9th of March 1852, the principal sudder ameen decided the talook to be liable to enhancement of rent, and employed an ameen to measure it and ascertain the rates of assessment.

The ameen reported the area of the talook, after deduction of beegahs 51-18-3 of waste land, to be beegahs 1977-12½, and the rental rs. 3413-10-8-2. He stated, however, that beegahs 596-12 were held by lakhirajdars, who had sunnuds from the zemindars.

The principal sudder ameen decided that the rates reported by the ameen were too high, while those put in by the defendants in the course of the enquiry were too low. He, therefore, fixed the rates in accordance with those which had been assessed on certain neighboring lands by a judicial decision, dated the 12th September 1854, and, deducting the land claimed as lakhiraj, gave plaintiff a

decree for a jumma of rs. 730-15-9 on beegahs 517-6-14, being her 6 annas share of the beegahs 1382-1-1, which formed, what he considered, the assessable area of the talook. He declined to allow the decree to take effect from the date of notice, on the ground that the area and jumma claimed by plaintiff had been disallowed, and ordered that its operation should be confined to the period subsequent to the date of decree. He gave full costs against the defendants.

From the decision of the principal sudder ameen two appeals are preferred, one by the substantial defendants, the other by the plaintiff.

The principal point in dispute is the liability of the talook to enhancement of jumma. The defendants contend that the principal sudder ameen has erred in throwing the burden of proving exemption from liability to assessment on them; that, according to the provisions of Section LI. Regulation VIII. of 1793, the plaintiff was bound to furnish proof that she was entitled to demand an increase of rent; that they had shown from the *bundobust furd*, the decision of 1810, and other documents, that they had held possession at a fixed rent from a period anterior to the decennial settlement, and that the plaintiff has entirely failed to prove that their rent had varied since that period.

Upon this point we are of opinion that the principal sudder ameen has placed the onus correctly. It has always been held in this Court, that Section LI. Regulation VIII. of 1793 refers to the talookdars mentioned in Section XLVIII., whose engagements with the zemindars were recorded at the time of the perpetual settlement. In the case of Kaleedass Neogee, reported at page 413 of the Decisions of August 1847, Mr. Hawkins remarks that, "by Section LI. Regulation VIII. of 1793 the zemindar is required to prove his right to demand an increase from dependant talookdars, recognised as such at the period of the decennial settlement, and holding their talooks at a fixed ascertained rent. In other cases the proof rests with the party claiming exemption, who must prove the right to hold at a fixed rent." In the case of Maharajah Kishen-kishwur Manik, page 292 of the same volume, the Court (Messrs. Jackson and Hawkins) state their opinion, that Section LI. "refers to dependant talooks recorded as such at the decennial settlement," and in the case of Ramcoomar Mustofee, 29th August 1850, (present: Messrs. Dick and Colvin, and Sir R. Barlow,) it was ruled that "the plaintiffs, the zemindars, are, no doubt, entitled to assess all lands which are not specially exempted, and the onus of proof of exemption rests entirely on the defendants, who must first prove their title."

Now, in this case, the defendants fail entirely to prove any title to exemption. They do not attempt to show that their talook was

recorded as a dependant talook at the time of the settlement, or that they have held at a fixed rent for twelve years prior to the decennial settlement. They produce a copy of a *bundobust furd*, which they wish us to accept as a sufficient record of the talook, but they fail to produce the original, although it appears from the *cazee's* decision of 1810 to have been in their possession at that time, and they do not account for its absence. The same is the case with the *kharijnama* of 1222.

The decision of 1810 was simply one for possession and registration of names, and there appears to have been no contest or decision on the subject of rates of rent. The defendants, however, in that case, stated the rent of the talook to have been rs. 276, which is inconsistent with their present assertions, and referred to an agreement, which they have not produced, that there should be a settlement of the rent with Buxoo Mamood.

The *dakhilas* which they produce only range from 1244 to 1256, and are quite insufficient to prove that the defendants have held at a fixed rent from the decennial settlement. We must, therefore, hold that the plaintiff is entitled to enhance the defendants' rent.

On the question of rates both parties appeal. The plaintiff, also, contends that the principal sudder ameen was not justified in deducting 596 beeghas 12 cottahs on the assumption it was *lakhiraj* land, and that she is entitled to the enhanced assessment awarded her from the date of notice, instead of from that of the decree.

We find that neither party is prepared to show that the rates awarded by the principal sudder ameen are unfair or improper. They are based on rates fixed by a judicial decision, after careful local investigation in the immediate neighborhood of defendants' talook, and we see no reason to doubt that they are correct. It is contended for plaintiff that, as defendants did not impugn the correctness of the rates stated in her plaint, she is entitled to have a decree for the full amount. On turning to the plaint, however, we find that the plaintiff herself expressly begged that an ameen might be appointed to measure the land and ascertain the rates, and that the court would then assess the proper rate. Under these circumstances it was clearly unnecessary for the defendants to demur to the plaintiff's rates.

We do not understand upon what grounds the principal sudder ameen has exempted the 596 beeghas 12 cottahs, which are claimed as *lakhiraj*. The defendants, in their answer, alleged, it is true, that there were certain *birmutter* and other *mehals* purchased by them within the mouzah of Dyapara, which the plaintiff had no right to assess; but they do not appear to have made any effort to prove that these lands were entitled to exemption, and they now shift their ground and declare that they belong to third parties. The plaintiff is entitled to a decree in respect of these lands.

She is also entitled to rent at the enhanced rates from the date of notice, with interest from the date of suit; for the defendants did not question the plaintiff's rates, but her general right to enhance, and that right the plaintiff has established.

With these modifications the principal sudder ameen's decision is affirmed. The defendants, appellants in case 650, will pay the costs of the original suit and of both appeals.

THE 31ST MAY 1859.

C. B. TREVOR, Esq., Judge, and G. LOCH and H. V. BAYLEY, ESQS.,
Officiating Judges.

Case No. 124 of 1855.

*Regular Appeal from the decision of Baboo Taruknath Sein,
Principal Sudder Ameen of Maunbhoom, dated 29th December 1854.*

Soodhakanth Kubiraj Mohunt Tagore, (Defendant,) *Appellant,*
versus

Russomunjooree Thakoorain and others, (Plaintiffs,) *Respondents.*

Baboo Shumbhoonath Pundit and Roy Sreenath Sein, for Appellant.

The Advocate General and Baboo Ramapersad Roy and Kishenkishore Ghose, for Respondents.

Suit laid at Rupees 41,625.

THIS case was decided on the 26th January 1858 (page 70), and a review of judgment admitted on 25th September following (page 1530), to try these two points: 1st, whether plaintiffs, as heirs of Jugudanund Tagore, and not as heirs of the original reversioners, are in time within twelve years after the death of the widow of Jugudanund, or whether their claim is barred by limitation; 2ndly, to try whether the Court's finding on the point of possession is or is not based on that which is not legitimate evidence.

for more than fifty years, urging that, according to family custom, ancestral property, on the death of a widow, reverted to the heirs of the male line, to the exclusion of the female line. Defendant, being a great-grandson of Jugudanund's daughter, pleaded limitation, and claimed the property under a special gift made by Jugudanund to his (defendant's) grandfather, Srekanth, who was nominated by Jugudanund to be mohunt, and, on being installed, got possession of the property as appertaining to his office under a hibanamah from Dasoomonee, the widow of Jugudanund, which she executed in conformity with the instructions of her deceased husband.

Held that, unless the defendant could prove his gift from Jugudanund and his allegation that Dasoomonee was not in possession of the property as a Hindoo widow, but merely as a trustee for Srekanth, the plaintiff's suit, within twelve years from the death of Dasoomonee, was in time, they being heirs of Jugudanund, and as such having only a contingent right during the lifetime of the widow, and being incompetent to sue for possession till after her death.

Held that, notwithstanding the presumption arising from long possession, as the defendant is unable to prove his allegation of gift and his possession derived from Dasoomonee is not incompatible with her possession as a Hindoo widow, the property must, on her death, pass to the plaintiffs, the nearest male heirs.

Plaintiffs, as nearest male heirs of Jugudanund Tagore, sued to obtain possession of his property within twelve years from the death of his widow Dasoomonee, who survived him

The circumstances of the case are fully detailed in our judgment of the 26th January 1858. They may be briefly stated as follows. Jugudanund Tagore died in 1189 B. S., leaving a wife, Dasoomonee, who, as alleged by plaintiff, took possession of her husband's property, and retained possession till her death in 1254 ; that plaintiffs, descendants of Jugudanund's elder brother, being the next male heirs, are entitled to succeed to the property in preference to the defendants, who, being descendants of Jugudanund's daughter by his second wife, cannot take the estate, as it is a custom in the family that the property, on the death of a widow, reverts to the heirs of the male line to the exclusion of the female line. The alleged family custom is not disputed by the defendant, who urges that Jugudanund adopted his grandfather Sreekanth, one of the sons of his (Jugudanund's) daughter, Shusheemookhee, having selected him for the office of mohunt, and left instructions with his wife Dasoomonee to make over his property to Sreekanth on his being installed ; that, in 1194, when Sreekanth was appointed mohunt, Dasoomonee executed a hibanamah, transferring the property to him ; that he held possession during life, and was succeeded by his son Madhubeeakanth, who was succeeded by the defendant Soodhakanth.

It was held by this Court in their judgment of the 26th January 1858, that Dasoomonee had made over the property to Sreekanth by hibanamah, and that her right and interest therein had consequently ceased ; and that, as the possession of Sreekanth, adverse to plaintiffs and all others, was publicly declared, and must have been known to the plaintiffs or their predecessors, their cause of action should date, not from the death of Dasoomonee, whose right was extinct, but from the time the grant was made and the adverse possession commenced ; and, consequently, the plaintiffs' suit was barred by lapse of time.

It is now contended for the plaintiffs that, admitting the possession of the defendant, that possession was not adverse to the plaintiffs. Dasoomonee, as shown by documents filed with the record, succeeded to her husband's property, in which she had a life interest, and retained possession till her death. She had no power to alienate the property, and the possession of the defendants was only as trustees or agents for her ; and such being the case, plaintiffs, reversioners, were not able to interfere to assert their rights during her lifetime. While she lived she might have made over possession to any one, but such possession could only be in trust for her, and could not be held as adverse to the rights of the reversioners, who were entitled to succeed at her death. It is further urged that the silence or acquiescence of the plaintiffs' ancestors, who were only reversioners, could not bind the plaintiffs, for they came into court, not as representatives of their immediate ancestors, but as heirs of Jugudanund ; that, as his widow was entitled to retain

possession of the estate during her life, their right to possession did not accrue till her death, which occurred in 1254 ; and that, as this suit has been brought within twelve years of the date of that occurrence, limitation will not apply.

On the other side it is contended that, though, under ordinary circumstances, the law of limitation would not be applicable, yet there was a specialty in this case, which rendered that law operative in this suit and barred its hearing. Dasoomonee had not, as alleged by the plaintiffs, a life interest in the estate. She held it in trust for Sreekanth Kubiraj, till he was of sufficient age to be installed as mohunt. Sreekanth was selected by Jugudanund from among his other grandchildren to fill the office of mohunt in his room, and was adopted by him ; and the property descended to him, not by virtue of his relationship to Jugudanund, but by virtue of his office as mohunt ; and Dasoomonee, being a woman, and unable to perform the duties of mohunt, made over possession of the property to Sreekanth, when he was installed, as directed by her deceased husband. The installation took place in 1194, and defendants have ever since held possession.

JUDGMENT.

The continuous possession of the defendant for more than fifty years, during the life-time of Dasoomonee, is admitted. The contention, however, on the part of the plaintiffs is, that such possession is not adverse, but subject to that of Dasoomonee ; that she, as a Hindoo widow, had a life interest in the property, and exercised the rights allowed her by law ; and that, during her life-time, the reversioners could not interfere with her management of the estate ; but that on her death it would revert to them as the heirs of her husband Jugudanund, free of all incumbrances created by her. Under ordinary circumstances plaintiffs would, undoubtedly, as heirs of Jugudanund, succeed to the estate on the death of his widow, and the period for bringing a suit to obtain possession, they being reversioners, would date from her death ; but, in the present case, the plea advanced by the defendant is, that Dasoomonee never held possession as a Hindoo widow, the property having been made over by the will of Jugudanund to Sreekanth, and that she was holding merely as a trustee till Sreekanth was installed. If this plea be proved, and the continuous possession of the defendant as proprietor, shown by sundry decisions of the civil courts, tends to support it, it will set aside the ordinary law of inheritance. It is therefore necessary, in the first place, that plaintiffs should give some proof that Dasoomonee held possession as a Hindoo widow. In proof of this, the plaintiffs have filed certain documents noted in the margin,* which, it is urged, show that Dasoomonee was not a

* Decision of the civil court, dated 8th December 1788 (1197). Charchitta of 1783 (1190). Petition filed by Chedanund Mohunt in 1826 (1283). Petition filed by Dasoomonee in 1838 (1244).

mere trustee for Sreekanth Kubiraj ; and plaintiffs bring to the notice of the Court, that the decision of 1803, No. 21804, which was not forthcoming when the case was formerly heard, but a copy of which has now been filed, is adverse to the defendant's claim, inasmuch as it discloses facts at variance with the statements now put forward by him ; and it was for this reason, and not because it was not procurable or mislaid, that the decision was not produced. The documents filed by plaintiffs, of which further notice will be taken hereafter, afford, we think, such sufficient proof of Dasoomonee's possession as a Hindoo widow as to render it necessary to call upon the defendant to prove his title. And on his part it is urged that, after the lapse of so many years, since he acquired possession, it is unreasonable to expect from him that full and perfect proof of title which would have been necessary had he but lately succeeded to the property. He holds the estate in virtue of his office as mohunt. Sreekanth his grandfather was adopted by Jugudanund and nominated to the office of mohunt ; and on his investiture in 1194 the property of Jugudanund was, according to his expressed wish, made over to Sreekanth. Dasoomonee held the property as trustee till Sreekanth was of sufficient age to be appointed mohunt, and she could hold it under no other status, for, being a woman, she was unable to perform the duties of mohunt ; and the absence of her hibanamah is immaterial, as Sreekanth obtained possession, not by virtue of her gift, but in virtue of his office ; and, in further proof of this, it may be observed that, had the property been transferred to Sreekanth by gift, and not in virtue of his office, all his heirs would have shared equally in it, whereas its possession and enjoyment were confined to that member of the family who succeeded to the office of mohunt.

Of the documents filed by plaintiffs, the first requiring notice is the decision of the civil court, dated 8th December 1789 (1197), in which copies of the char of 1783 (1190) are embodied. This document is a decree obtained by Dasoomonee against Rajah Gooroonarain, awarding her possession of certain rent-free lands dedicated to religious purposes, acquired by her husband, and the char of 1783, filed to support her claim in that case, shows that, on her representation, the lands had been released to her by competent authority as heir of her husband and in possession of his property. Neither in the decree nor in the char is she styled as guardian of or trustee for Sreekanth Kubiraj. Another document, copy of a petition of Chedanund Mohunt, father of the plaintiffs, of 1233, (1826,) was filed by him in a suit brought by Madhubeeakanth Kubiraj against Rajah Gooroonarain, to recover possession of certain lakhiraj lands. The petition is of the nature of a claim. It denies the right of Madhubeeakanth to possession, or to the office of mohunt, speaks of Dasoomonee as being then in possession, and urges his own right after her death. Nothing

is proved by this document, except that plaintiffs' ancestors did not neglect to agitate their claim to Jugudanund's property on all occasions. The fourth document filed is a petition presented by Dasoomonee to the civil court, on the 24th February 1838, on the occasion of certain property, real and personal, being attached in execution of a decree against Runguneeekanth Kubiraj. In this petition she claims the attached property as belonging to her husband Jugudanund Tagore, declares herself to be in possession, and that, till her death, no one has a right to any of the property left by her deceased husband, which, at her death, will be divided among her heirs. A copy of the decision of 16th April 1803 (1209), No. 21804, alluded to in our judgment of the 26th January 1858, has now been filed with consent of parties, and read to the Court. In that case Sreekanth Kubiraj sued Bour Singh Hazaree, to recover possession of certain lands appropriated by him, and mesne profits, in the shape of rent, and obtained a decree. In the plaint, an abstract of which is given in the decision, Sreekanth states of himself, that his grandfather Jugudanund had brought him up from a child, and had given him all his property, real and personal, and had installed him on his guddee as mohunt, and executed a deed to that effect; and it is contended for the plaintiffs in the present suit, that this statement of the transfer of the property, by a deed, executed by Jugudanund, is inconsistent with the claim now put forward—that Sreekanth was nominated by Jugudanund, and, when installed after Jugudanund's death in the office of mohunt, was put in possession of his property under a hibanamah executed by Dasoomonee.

Now, as regards these documents, it is to be observed that the char of 1190 (1783) and the decision of 1197 (1789), make no mention of Sreekanth; and the reason assigned for this omission is that in 1190 he had not been formally installed as mohunt, and the decision of 1197, though passed subsequent to that event, relates to a suit instituted previously. If, however, the property had really passed to Sreekanth by gift from Jugudanund, and if Dasoomonee were only a trustee, it is singular that she should have sued in her own name and not as guardian or manager for the minor, and, when he got possession, that he did not apply to have his own name substituted as plaintiff in the suit which was still pending. It is remarkable also that, if the property passed to Sreekanth by gift from Jugudanund, a separate hibanamah should have been executed by Dasoomonee, for, in that case, she, as trustee, had no power to make a gift, and no occasion to execute a hibanamah, but was bound to transfer the property to Sreekanth on his installation. And if Jugudanund had, as asserted by the defendant, adopted Sreekanth, and nominated him as his successor on the guddee, and assigned to him all his property, it is strange that he should have omitted to execute the necessary deed of gift, and have left that

duty to his widow. In the decision of 16th April 1803, however, Sreekanth distinctly asserts that he held possession under a deed from Jugudanund, but this statement is utterly at variance with the defendant's plea, which declares that the deed of gift was executed by Dasoomonee. Again, as regards the petition of Dasoomonee in 1838, no explanation is offered us why, if the defendant were in possession as proprietor, he, when the property was attached in execution of a decree against Runguneeakanth, remained silent, and allowed Dasoomonee to intervene and claim the property.

Our judgment of the 26th January 1858 rests greatly on a decision of the civil court, dated the 29th April 1840. In that case Lulitakanth Kubiraj, a nephew of Sreekanth, sued Soodhakanth and Runguneeakanth for possession of certain lands, which he alleged had been given to his father Gopeekanth by Dasoomonee, and of which his father had been deprived by the defendants. Dasoomonee was made a party to that suit, and, in her answer, admitted the gift to Sreekanth in conformity with the instructions of her husband Jugudanund, and added that the property was now in the joint possession of his heirs; and the result was, that the suit was dismissed as the possession of Sreekanth by gift from Dasoomonee was considered to be proven. Two documents are referred to in that decision as proving the possession of Srikanth. These are certain records from the bazee-zumeen dufter; one of which, dated 1171, showed the name of Sreekanth joined with Sreemuttee Bewah, *i. e.* Dasoomonee, as in possession of mouzah Aughoria, part of the property now in dispute; the other, of 1194, related to mouzah Koonoree, &c., described to be in the possession of Sreekanth and others according to a hibanamah executed by the wife of the grantee, Jugudanund Tagore. Now, it is clear that there is some error or interpolation in the first of these records, or it must relate to some other party; for Jugudanund Tagore was alive in 1171, and continued in possession of his property till his death in 1189, and it is admitted by the defendant that Sreekanth's possession dates from 1194, the year of his installation. This record, therefore, appears to be deserving of little credit. The second record referred to in the decision shows that the villages described are not in the sole possession of Sreekanth, but of Sreekanth and others, under a hibanamah executed by Dasoomonee. This entry is inconsistent with the statement made by Sreekanth as recorded in the decision of 1803, and opposed to the claim now set up by the defendant, that Sreekanth enjoyed sole possession. Against this evidence, which strongly supports the plaintiffs' plea, and shows some inconsistency in the title under which defendant now claims, there is only, on the defendant's part, the presumption arising from length of possession, and that not altogether undisputed, and the fact that possession has been enjoyed by one or other of the lineal descendants of Sreekanth, holding the

office of mohunt, to the exclusion of the other heirs. The decisions which have been filed by the defendant in support of his title prove nothing as against the present plaintiffs, who were not parties or privies to those suits. As, therefore, the possession of the defendant, derived from Dasoomonee, is not incompatible with her possession as a Hindoo widow, and defendant has failed satisfactorily to establish his special title under gift from Jugudanund Tagore, we think the property must follow the usual law of inheritance, and pass to the plaintiffs, who are the nearest male heirs to the deceased, Jugudanund, a fact not disputed by the defendant. We, therefore, reverse our judgment of the 26th January 1858, and affirm the decision of the lower court, with costs.

THE 31ST MAY 1859.

J. H. PATTON and E. A. SAMUELLS, ESQs., Judges.

Petition No. 1195 of 1858.

Application for Special Appeal from the decision of Mr. O. W. Malet, Judge of Beerbhoom, dated 18th May 1858, reversing that of Baboo Peareemohun Banerjee, Principal Sudder Ameen of that district, dated 16th June 1857, in the case of

Kenaram Samunt and another, *Plaintiffs*, Petitioners,

versus

Nilmonee Acharj, *Defendant*, Opposite Party.

Baboo Baneemadhub Banerjee, for Petitioners, *Ex-parte*.

It is hereby certified that the said application is granted on the following grounds.

The plaintiffs sued for value of certain wood misappropriated by the defendant, and stated in their plaint that their title to the wood had been admitted in a suit before the Gopalpore moonsiff, which was decided on the 22nd December 1848.

The judge has dismissed the suit, on the ground that the case referred to was remanded from the appellate court, and that the plaintiffs' claim was not finally established until the 30th December 1849; consequently, that the plaintiffs ought to have sued on the decision of 1849, instead of on that of 1848. Against this decision a special appeal is preferred, on the ground that plaintiffs' suit is not based, as the judge erroneously assumes, on either of these decisions, but on their general right to the wood, and that the roobukarees referred to are merely evidence in favor of their claim. This is unquestionably so. The suit is remanded, with instructions to the judge to dispose of it on its merits.

right to the wood, which ought to be investigated, and that the alleged merely evidence of their claim.

In a suit for value of wood misappropriated, in which plaintiffs had alleged an admission by the defendant of their right to the wood in a former case, and the judge dismissed the suit, on the ground that the case referred to had been remanded for re-investigation. Order reversed, and case remanded, on ground that plaintiffs' suit was based on their general

THE 31ST MAY 1859.

H. T. RAIKES, ESQ., Judge, and G. LOCH and H. V. BAYLEY, ESQS.,
Officiating Judges.

*Special Appeal from the decision of Mr. E. Latour, Judge of the
24-Pergunnahs, dated 18th March 1858, reversing a decree
of Baboo Taruknath Sein, Principal Sudder Ameen of that
district, dated 6th May 1857.*

No. 653 of 1858.

Madhubchunder Aduk, (one of the Defendants,) *Appellant,*
versus

Nagenderchunder Ghose, receiver on behalf of Anundnarain Ghose,
(Plaintiff,) and Thakoordass Holdar and others, (Defendants,)
Respondents.

Baboo Dwarkanath Mitter, for Appellant.

*Baboo Kishenkishore Ghose, Bhoobunmohun Roy, and Hurkalee
Ghose, for (Plaintiff,) Respondent.*

The judge
having assumed
a title by a
grant, further
proof beyond
such assump-
tion was deem-
ed requisite, and
the case re-
manded accord-
ingly.

THIS case was admitted to special appeal on the 30th Septem-
ber 1858, under the following certificate recorded by Messrs. H. T.
Raikes and J. H. Patton.

"This suit was brought by the vendee of an auction purchaser,
who, in execution of a decree, had purchased the rights and interests
of one Thakoordass in certain real property, and had possession
delivered over to him. Subsequently the purchaser of a decree
against one Gourmonee, the wife of Ramnarain, sold this same
property in execution as belonging to Gourmonee as heir of Ram-
narain, and bought it himself, and then dispossessed the plaintiff in
this action.

"The first court held that the right and possession of Ramnarain,
at some period, in the property, was not questioned by either
party, but as there was neither allegation nor proof of Thakoordass's
having ever succeeded to the property, by either gift or inheritance,
the purchaser of the property in execution of a decree against
Thakoordass could not establish any title to it; so plaintiff's case
was dismissed.

"In appeal, the judge of the 24-Pergunnahs argued that, as Ram-
narain, the original proprietor and husband of Gourmonee, never
disputed the execution sale of the property as belonging to Thakoord-
dass, and Thakoordass was his son-in-law, the court may presume
that Thakoordass held by grant, and was in rightful possession
when the property was sold, and on this ground decreed the suit in
favor of the plaintiff.

"The special appeal is, that the judge could not presume a title
which neither party laid claim to, and that he has decreed upon
conjecture only, and has failed to determine the case on legal grounds.

“ We admit the special appeal, to try whether the judge was competent to presume a title which the parties to the record had not advanced.”

JUDGMENT.

On a reference to the judge's decision, we do not observe that the judge finds that there is proof of possession or title. He holds that the possession of Thakoordass is to be assumed from the fact of the father-in-law and mother-in-law not questioning it, and from that assumed possession he presumes a grant, and thence a title. We are of opinion that the possession of Thakoordass should have been found on better grounds than the mere silence of his father and mother-in-law ; and that the presumption of title by a grant on such a basis, without further proof, cannot be admitted. We, therefore, uphold the decision of the lower court, reversing that of the judge, with costs.

SUMMARY CASES.

THE 4TH MAY 1859.

H. T. RAIKES and A. SCONCE, Esqs., Judges, and H. V. BAYLEY, Esq.,
Officiating Judge.

No. 175 of 1859.

Rughoonath Chuckerbuttee, *Appellant*, Petitioner,
versus

Kasheshuree Debea, *Respondent*, Opposite Party.

Baboo Ramapersad Roy, Shumbhoonath Pundit, and Kishen-
kishore Ghose, for Petitioner.

Mr. R. T. Allan, for the Opposite Party.

THIS case was referred to a full bench on the 16th April 1859, under the following order recorded by Mr. A. Sconce.

"In trying a regular suit, the principal sudder ameen of Rajshahye has thrown out a wuseeutnamah, filed by defendant, petitioner and has directed an inquiry into a charge of forgery, to be investigated with a view to the eventual reference of the charge to the magistrate.

"Mean time, the decision of the principal sudder ameen (made on the 2nd September 1858) is under appeal to this Court; and petitioner applies for an order to cause the investigation of the supposed forgery to be stayed till the appeal pending here be disposed of.

"It seems the practice to be followed in such cases should be considered by a full bench; and I refer this application accordingly."

JUDGMENT.

A precedent is afforded by an order passed in a case of appeal pending in this Court in 1853.

On the 13th September 1853, the judge presiding in the miscellaneous department was applied to, to stay a prosecution for forgery, directed to be brought against the defendant in the suit, who had appealed from the decision passed in the case itself to the Sudder Court; and the judge before whom the application came directed the criminal proceedings to be kept in abeyance until judgment had been given on the appeal.

The case is that of Mahadeb, appellant, *versus* Neettajeet Singh, respondent, and the above order was passed on the date as given above.

We think it is only necessary to follow that precedent on the present occasion, and direct the postponement of further proceedings in regard to the alleged forgery of the wuseeutnamah, until judgment may have been passed by this Court on the appeal now pending before it. The appeal case to be brought up for hearing as soon as it conveniently can be.

In accordance with precedent, proceedings of enquiry about a supposed forgery stayed, pending disposal of an appeal preferred by the accused, against the decree passed.

THE 4TH MAY 1859.

H. T. RAIKES and A. SCONCE, Esqs., Judges, and H. V. BAYLEY, Esq.,
Officiating Judge.

No. 230 of 1859.

Goyadeen Patuk, *Petitioner.*

Baboo Kishensukha Mookerjee, for Petitioner.

THE petitioner having filed his application for a review within the time prescribed by Section III. of the Act (XLI. of 1858), he is entitled to come in on a stamp of two rupees' value, that being the amount fixed on applications of this nature filed within the period allowed by law.

THE 7TH MAY 1859.

H. T. RAIKES and A. SCONCE, Esqs., Judges, and H. V. BAYLEY, Esq.,
Officiating Judge.

Case No. 719 of 1858.

Summary Special Appeal from the decision of Mr. H. M. Reid, Officiating Judge of East Burdwan, dated 3rd August 1858, affirming a decree of Mr. H. S. Thompson, Principal Sudder Ameen of that district, dated 30th April 1858.

Bholanath Singh, *Claimant*, Petitioner,
versus

Kishengobind Biswas, *Defendant*, Objector.

Baboo Shumbhoonath Pundit and Dwarkanath Mitter, for Plaintiff.

Mr. R. T. Allan and Baboo Kishenkishore Ghose, for Defendant.

A putneedar cannot hold a durputnee liable for an old balance. When it was sold to a new durputneedar for balance of rent, a previous balance due upon a decree became a personal debt of the ousted durputneedar. Order of lower court reversed.

THIS case was admitted to summary special appeal on the 10th January 1859, under the following certificate recorded by Messrs. B. J. Colvin and G. Loch.

"The petitioner held a mortgage of the durputnee Gopeenathpore, belonging to Daood Alee, and on the 29th July 1856 obtained a decree for possession. In the course of execution it appeared that an 8-anna share of the durputnee had been sold to satisfy the claims of the zemindar, which were realised, and a surplus remained in the collector's hands. To this money the petitioner, as mortgagee, was entitled. A suit was, however, instituted on the 14th April 1857, by Kishengobind Biswas, for rent for 1261, against Daood Alee, and the objection of the plaintiff was that he was a joint durputneedar with Daood Alee, and had paid rent to the zemindar in excess of the amount due by him, and, therefore, he sued to recover the excess payments from his co-partner. The suit, therefore, was not one between a zemindar and ryot for rent, but one partner suing another

for payments made on his account. The petitioner filed a petition of objection, but the plaintiff obtained a decree in January 1858, wherein it was provided that, in execution, the claims of the petitioner should be considered ; that, if the claim were then rejected, the money should be paid to the plaintiff, and if any part of the sum due to plaintiff then remained unpaid, he must recover it as a personal debt from the defendant. When plaintiff sued out execution, the petitioner filed his claim, which was rejected, and this order was confirmed by the judge.

" It is urged in special appeal, that the reasons assigned by the judge for rejecting the petitioner's claim are invalid. In his judgment he speaks of two summary decrees for the rent of 1261 and 1262, obtained by the plaintiff against the defendant, and, being summary, as having a preferential right to be satisfied before the mortgagee's claim. The summary decree of 1262 was not before the court, and the decree of 1261 was not summary, otherwise it could not have come before the judge in execution. The fact of the zemindar's having brought a claim for rent within time before the collector, which claim was rejected through his neglect, will not give the action he may bring in the civil court (not to reverse that order, but simply to recover rent) a preference over the mortgagee's claim. Further, the lower courts have misapprehended the nature of the case. It is not the suit of a zemindar against a ryot for rent, but of a partner suing a co-partner for excess payments of rent made by him on account of the other. Lastly, as the petitioner's right as mortgagee became complete by expiry of the year of grace on the 29th July 1854 (15th Srabun 1261,) and he obtained a decree for possession before the suit for the rent of that year was instituted, why should the petitioner's right to the money be considered incomplete as against the zemindar ?

" On the other hand, it is stated that the plaintiff in this suit, Kishengobind, and the defendant Daood Alee, were originally durputneedars. The putnee was sold for arrears of rent by the zemindar, and purchased by the durputneedars, who held possession. Kishengobind, as putneedar, brought a summary action against Daood Alee for the rent of the durputnee still held by him, for the years 1261 and 1262, and obtained decrees before the deputy collector. On appeal the collector nonsuited the case for 1261, but confirmed the decree for 1262, and in execution of it sold the durputnee. The proceeds of sale not only covered the amount of rent due for 1262, but left a surplus in the hands of the collector ; and Kishengobind brought a regular suit to recover the rent of 1261 from the proceeds in the collector's hands. The lower courts have considered him entitled to the money, as the suit was for rent of 1261 on account of the same land, for which he had already obtained a decree for the rent of 1262, and the money was the proceeds of sale in execution

of that decree. The petitioner, mortgagee, might and should have saved his right by paying the rent. Daood Alee defaulted, and petitioner is only the representative of Daood Alee and should have paid up.

"There is some ambiguity in the wording of the plaint, which gives color to the petitioner's plea, that the lower courts have misapprehended the nature of the suit. We, therefore, admit the appeal, to try whether the judge's order, with reference to the objections urged by petitioner, be correct or not."

JUDGMENT.

This application relates to the surplus proceeds resulting from the sale of a durputnee tenure held by one Daood Alee. The durputnee fell into arrears for 1262, and, for the realisation of the balance due, was, on the 14th April 1857, brought to sale: accordingly, after satisfying the putneedar's demand for 1262, a surplus remained, which gives occasion to the present action. On the one hand this surplus is claimed by the putneedar, in order to the execution of a decree acquired by him, on the 27th January 1858, against Daood Alee, for the arrears of 1261, that is, for the year preceding that for the arrears of which the sale took effect; and on the other, the special appellant now before us asserts his right to the surplus, by virtue of a foreclosed mortgage held by him over the durputnee tenure. On the 29th July 1856, decree for possession was made in favor of special appellant as against Daood Alee, his right to the tenure running from the date of foreclosure, that is, July 1854 (1261). The zillah judge has held the putneedar entitled to carry off the money in liquidation of his decree against Daood Alee for the year 1261. But it appears that this order must be set aside. First, we would observe that the putneedar has no special lien on the durputnee for the adjustment of an old balance. The tenure was sold at the close of 1263, for the recovery of an arrear decreed due for 1262. The arrear still outstanding is for the preceding year 1261, and must be regarded as the personal debt of Daood Alee, against whom it was decreed. But the decree made in favor of special appellant, under the foreclosed mortgage, has determined his right as durputneedar in substitution of Daood Alee, and, necessarily, what remains of the proceeds of the sale belongs to special appellant, and not to Daood Alee. The arrear of 1261 is, as already said, the personal debt of Daood Alee, and for the discharge of his debt special appellant cannot be held answerable. We, therefore, set aside the order of the judge, and direct the money in question to be paid to special appellant. Costs on respondent.

THE 19TH MAY 1859.

H. T. RAIKES, Esq., Judge, and H. V. Bayley, Esq., Officiating Judge.

Petition No. 58 of 1859.

Application for the admission of a Summary Special Appeal from the decision of Mr. W. H. Broadhurst, Officiating Judge of Purneah, dated 9th November 1858, striking off a decree of Moulvee Abdool Uzeez Khan, Principal Sudder Ameen of that district, dated 15th April 1858, in the case of

Shumbhoonath, Decree-holder,
versus

Koodrutoollah and another, Debtors.

Moulvee Aftabooddeen Mahomed, for Petitioner.

Baboo Unnodapersad Banerjee, for the Opposite Party.

It is hereby certified that the said application is granted on the following grounds.

The special appellant urges that he, as the absent party below, was not summoned three times at intervals of a week, as required by the decision of the 24th April 1851, Summary Reports, page 217. We find this to be the fact; and the case must be remanded, in order that the rule laid down there be duly adhered to.

Appeal decreed, with costs, accordingly.

Summons
three times at
intervals of a
week required,
as ruled by
Sudder Dewa-
ny Adawlut De-
cisions, 24th
April 1851,
page 217.

THE 25TH MAY 1859.

H. T. RAIKES and J. H. PATTON, Esqs., Judges, and H. V. BAYLEY, Esq.,
Officiating Judge.

Case No. 256 of 1858.

Summary Special Appeal from the decision of Mr. J. Grant, Judge of Dinagepore, dated 20th February 1858, reversing a decree of Mr. J. Reily, Principal Sudder Ameen of that district, dated 10th May 1856, in the case of

Mahatab Singh, Decree-holder,
versus

Zalim Singh, and, on his demise, Mussumat Chando, widow of the deceased, and Nanukpersad Singh, Debtors.

Moulvee Aftabooddeen Mahomed, for Petitioner.

Baboo Unookoolchunder Mookerjee, for the Opposite Party.

THIS case was admitted to summary special appeal on the 16th July 1858, under the following certificate recorded by Messrs. A. Sconce and D. I. Money.

Lower court's
order was cor-
rect, making
the brother and
widow, who
were in joint possession of deceased's property, liable for the decree against him.

"This case refers to the execution of a decree held by Mahatab Singh against Gobind Singh, deceased. Before the principal sudder ameen the decree-holder applied for execution against Chando, widow of the deceased, and petitioner, his brother ; but the principal sudder ameen discharged both ; and, on appeal to the judge, the order was passed, which petitioner brings up now in special appeal.

"The ground of the petitioner's application is that, though the judge holds the widow only to be answerable to the decree-holder for the property held by her, the order made, nevertheless, is applicable to petitioner.

"There seems to be some doubt as to the judge's meaning ; and the language used in the opinion expressed is obscure. So much the judge says distinctly, that the widow of the deceased cannot be exempted from liability ; but the order conveyed to the principal sudder ameen directs the decree to be enforced against both respondents. As the case now stands, this order should be amended, and we admit the special appeal to try that point, but, at the same time, with reference to Section IV. Act XXXIII. of 1854, we direct the judge to certify more explicitly his reasons for the order made by him."

JUDGMENT.

The judge has explained that his decision was intended to make both the brother and the widow liable, as both of them were proved by the evidence on the record to be in possession of the general property of the deceased.

We see nothing in this finding to be questioned in special appeal, and we reject this appeal, with costs.

THE 25TH MAY 1859.

H.T. RAIKES and J.H. PATTON, Esqs., Judges, and H.V. BAYLEY, Esq.,
Officiating Judge.

No. 590 of 1858.

*Summary Special Appeal from the decision of Mr. O. W. Malet,
Judge of Beerbhoom, dated 20th May 1858, reversing a decree
of Baboo Peareemohun Banerjee, Principal Sudder Ameen
of that district, dated 20th February 1858.*

Gendum Beebee, Debtor, Petitioner,
versus

Lalla Bechoo Lall, Decree-holder, Opposite Party.

Baboos Baneemadhub Banerjee and Dwarkanath Mitter, for
Petitioner.

Moulvee Murhumut Hossein (absent), for the Opposite Party.

THIS case was admitted to summary special appeal on the 6th
December 1858, under the following certificate recorded by Messrs.
B. J. Colvin and G. Loch.

"Petitioner and Manikchand held counter decrees against each
other for land, wasilat, and costs. The latter sold his decree against
petitioner to Bechoo Lall, the claim by it being less in amount than
the claim of petitioner against Manikchand.

"On a former occasion, i. e. 26th November 1857, (page 1780 of
Sudder Decisions of that year,) it was held that the petitioner might
file her receipt for the amount of her decree against Manikchand,
which would *pro tanto* reduce the claim of Bechoo Lall against her.
This order was made applicable only to the costs in the suit, as at
the time no mention was made of any thing but land and costs.
On Bechoo Lall's again taking out execution, the principal sudder
ameen of Beerbhoom extended the above principle to the wasilat,
and, finding that more on that account was due to petitioner than
she had owed to Manikchand for wasilat, he struck Bechoo Lall's
application for execution off the file; but the judge, on appeal by
Bechoo Lall, considered that the order of this Court was restricted to
costs, and did not relate to wasilat, which being the product of land,
must, he thought, follow the order passed regarding the land, and
reversed the principal sudder ameen's order.

"It is objected in special appeal that wasilat being represented by
value in money, the order relating to costs was equally applicable
to wasilat.

"We admit the appeal to try the point."

JUDGMENT.

We consider the judge's order in this case incorrect. The
main plea of the special respondent is that, as Manikchand had

On a special
appeal to the
effect that an
order relating
to costs was
equally appli-
cable to mesne
profits, held
that it was so
in this case, as
in it two decree-
holders hold
decrees against
each other,
and those de-
crees, with all
such items as
they comprised,
should be debited
and credited
in adjustment
of the respect-
ive accounts.

transferred his decree for land, wasilat, and costs, to Bechoo Lall, and the orders of this Court, in Sudder Dewanny Adawlut Decision of 26th November 1857, page 1780, applied only to costs, the transfer to Bechoo Lall of the decree for wasilat barred those wasilat being treated as a set-off in favor of Gendun Beebee for her decree against Manikchand. The special respondent's pleader has also urged that costs were allowed to be treated as a set-off only in accordance with the special case of the 27th October 1846, Summary Reports, page 110, Hurrishchunder, petitioner. But these pleas are quite untenable. There can be no restriction in the application of the general principle in this case as to all the ingredients of the two decrees, wasilat as well as costs; for the correct application of that general principle is that, where two decree-holders hold decrees against each other, both, with all such items as they comprise, shall be used in account, to debit and credit, as the case may be, in the adjustment of the claims of the parties against each other respectively *under* such decrees, and no transfer can nullify the operation of this principle.

We reverse the order of the judge, and decree the special appeal, with costs.

THE 25TH MAY 1859.

H. T. RAIKES and J. H. PATTON, ESQs., Judges, and H. V. BAYLEY, ESQ.,
Officiating Judge.

No. 822 of 1858.

*Summary Appeal from the decision of Mr. G. P. Leceyster, Judge
of Midnapore, dated 14th September 1858.*

Syndaul Hossein, *Petitioner,*

versus

Government and Gunganarain Mehtee, *Decree-holder, Opposite
Party.*

*Moonshee Ameer Alee and Moulvee Murhumut Hossein, for
Petitioner.*

Baboo Ramapersad Roy, for Government.

*Baboo Ramapersad Roy and Chundernath Chatterjee, for
Gunganarain Mehtee.*

THIS case was referred to a full bench on the 8th January 1859, under the following remarks recorded by Mr. A. Sconce.
"The petitioner was surety for Kasheenath Bose, the treasurer of the judge of Midnapore; and having been called upon to make good the sum of rs. 2400, which, on the 28th September 1852, the
The liability of a treasurer's surety under security bond continues, even though he has been discharged on formal acquittance, until the accounts of the period during which he was surety have been correctly balanced.

Lower court's order correct, excepting as to the interest charged upon the surety.

treasurer, without authority, had charged and misappropriated, he now appeals against the judge's order.

"It appears that the office of treasurer was abolished on the 1st October 1852, and that, on the 29th November following, his surety, the petitioner, applied to be discharged from the liability which he had contracted by giving security for the treasurer. In meeting this application, a reference appears to have been made by the judge to his subordinate moonsiffs, and, on returns having been received from those officers, the judge, on the 20th April 1853, recorded two orders; one, on the record or nuthee, in which it was directed that, as the treasurer's accounts had been examined for a considerable period and no objection had been preferred, the application should be considered disposed of; the other, in the 'yad dasht' book, in which the remark is made, that there appeared to be no objection to relieve the petitioner from his obligation as surety.

"For the petitioner, with reference to these orders, and to the discharge of the treasurer from his office as such, about five years before the embezzlement was discovered, it is contended that it is not competent to the zillah judge summarily to exact from him the amount of the late treasurer's defalcation.

"It is also argued that the judge has exceeded his authority, in directing petitioner to pay interest upon the principal sum, from the date on which that sum was payable to the parties on whose account the deposit was held.

"I think it proper to refer the case for the consideration of a full bench."

JUDGMENT.

The only question which appears to have been raised by this certificate is, whether the judge was competent to realise the amount of these defalcations from the surety in the summary mode adopted by him, and which was the course undoubtedly open to him so long as the security bond could be considered in force. We have, therefore, only to consider whether the security bond was in force beyond the 20th April 1853, the date of the judge's order, under which the appellant assumes his property was formally released.

On the point of duration of a surety's liability under the security bond executed by him, we find a precedent in the case of Tarneepersad Nyaruttun Bhattacharj, decided 19th June 1840. In that case, the treasurer of Burdwan had been detected in various embezzlements during a long course of service, and had, during that time, changed his sureties more than once, who had, moreover, on their discharge, received formal acquittances from the judge. Notwithstanding this, they were held liable for defalcations occurring during the time of their suretyship; and the majority of the Court likewise held, that the amount for which they were liable

was realisable summarily by attachment and sale of the property pledged.

The principle followed in that case appears to be that, until the accounts were correctly balanced, no release from security could be granted, and that the subsequent discovery of the defalcation showed that the accounts had not been correctly balanced at the time of discharging the surety. Following this precedent in the present case, we hold the judge to have adopted a legal course ; but we dissent as to the legality of saddling the surety with interest for the benefit of the decree-holder, whose money was in deposit and misappropriated by the treasurer. With the above modification of the judge's order we reject the appeal.

C. J. M.

